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No.

In the Supreme Court of the United States

IN RE: SPEARING TOOL AND MANUFACTURING CO., INC.,
DEBTOR.

CRESTMARK BANK, a Michigan banking corporation,
and CRESTMARK FINANCIAL CORPORATION,
a Michigan corporation,
Petitioners,

v.

UNITED STATES OF AMERICA, DEPARTMENT OF
TREASURY, INTERNAL REVENUE SERVICE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN P. ROSS
Counsel of Record
SHAHEEN, JACOBS & ROSS, P.C.
1425 FORD BUILDING
DETROIT, MI 48226-3993
(313) 963-1301

Counsel for Petitioners

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED

Under Revised Article 9 of the Model Uniform Commercial Code ("Revised Article 9"), which is the uniform law adopted in all 50 states, all liens in all states are marked, indexed, and held based on the exact registered name of the entity under which the lien is filed in the requisite state office. If a lien is not filed using the debtor's exact registered name, the creditor's lien is invalid.[1]

In April 1998 and April 2001, petitioners, Crestmark Bank and Crestmark Financial Corporation (collectively, "petitioners" or "Crestmark"), filed financing statements with the Michigan Secretary of State, identifying the debtor as "*Spearing Tool and Manufacturing Co.*," the debtor's exact registered name ("Debtor"). Later, on October 15, 2001, respondent, United States of America, Department of Treasury, Internal Revenue Service, ("IRS" or "respondent") filed two notices of federal tax lien (variously, "NFTLs" and "liens") against the Debtor with the Michigan Secretary of State. Each NFTL misidentified the debtor as "*SPEARING TOOL & MFG COMPANY INC.*" Thereafter, before making further loan advances to the Debtor, petitioners requested that the Michigan Secretary of State perform multiple searches for liens (private searches are not permitted), using the Debtor's exact registered name, none of which disclosed the IRS's liens, because the IRS had not used the debtor's correct name.

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[1] There is an exception. Michigan Compiled Law ("M.C.L.") §440.9506(2), (3) provides the exception included in all state statutes, i.e. that the lien is not invalid if the state's search engine nonetheless discloses the lien that did not use the debtor's exact registered name. Notices of Federal Tax Liens ("NFTLs") are indexed and searched as if "a financing statement." M.C.L. §211.665.

Consequently, petitioners unwittingly advanced funds to the Debtor that were subject to these secret IRS tax liens. Respondent now seeks to enforce its lien filings with a priority it alleges is superior to the petitioners' liens. The questions presented are:

1. Is a secured creditor's lien superior to an IRS lien, when the IRS lien notice is filed using a name other than the debtor's registered name, and, consequently, the IRS's lien is not revealed by searches of the filing office's electronically stored records?

2. Did the U.S. Bankruptcy Court and the Sixth Circuit Court of Appeals err by granting summary judgment to the IRS, *sua sponte,* and based on unadjudicated factual allegations?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption contains the names of all of the parties.

Crestmark Bancorp, Inc. is the parent company of petitioner Crestmark Bank. Petitioner Crestmark Bank is the parent company of petitioner Crestmark Financial Corporation. No publicly held company owns 10% or more of the stock of petitioner Crestmark Bank or petitioner Crestmark Financial Corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Crestmark Bank and Crestmark Financial Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit opinion is published at *In Re Spearing Tool and Mfg. Co.*, 412 F.3 653 (6th Cir. 2005) (Apx. 3a)[2] The United States District Court for the Eastern District of Michigan, Southern Division, in an unpublished order, reversed the United States Bankruptcy Court for the Eastern District of Michigan, Southern Division, on November 6, 2003, and entered judgment for the petitioners. (Dist. R. 14, Order Reversing the Opinion and Order of the Bankruptcy Court, Apx. 11a; Dist. R. 15, Judgment, Apx. 23a) The United States Bankruptcy Court entered its order granting summary judgment, *sua sponte*, in favor of the respondent on May 15, 2003. (Bankr. R. 26, Order, Apx. 24a; Bankr. R. 27, Judgment, Apx. 34a)

JURISDICTION

Petitioners filed their adversary complaint in the U.S. Bankruptcy Court seeking a ruling on the priority of their

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[2] "Apx." refers to the accompanying appendix. "Cir.Ct. Apx." refers to the appendix filed with the U.S. Court of Appeals for the Sixth Circuit. "Bankr. R." refers to a docket entry for the U.S. Bankruptcy Court. "Dist. R." refers to a docket entry for the U.S. District Court. "Cir. R." refers to a docket entry for the U.S. Court of Appeals for the Sixth Circuit.

liens over respondent's asserted federal tax liens relating to the assets of Spearing Tool and Manufacturing Co., invoking the bankruptcy court's jurisdiction under 28 U.S.C. §§ 157(b)(2)(K) and 1334. (Bankr. R. 1, Complaint, Cir.Ct. Apx. 7) After Petitioners filed their motion for summary judgment, the U.S. Bankruptcy Court granted summary judgment, *sua sponte*, in favor of respondent on May 15, 2003. (Bankr. R. 26, Order, Apx. 24a; Bankr. R. 27, Judgment, Apx. 34a) Petitioners filed a timely notice of appeal on May 23, 2003, to the United States District Court for the Eastern District of Michigan (Bankr. R. 28, Notice of Appeal, Cir.Ct. Apx. 81), pursuant to 28 U.S.C. § 158(a). On November 5, 2003, the U.S. District Court entered its order reversing the U.S. Bankruptcy Court's order and entered judgment in favor of petitioners. (Dist. R. 14, Order, Apx. 11a; Dist. R. 15, Judgment, Apx. 23a) Respondent, on December 29, 2003, filed its timely notice of its appeal to the United States Court of Appeals for the Sixth Circuit (Dist. R. 18, Notice of Appeal, Cir.Ct. Apx. 251), pursuant to 28 U.S.C. §§ 158(d) and 1291. The United States Court of Appeals for the Sixth Circuit (variously, "circuit court" and "lower appellate court") issued its decision on June 21, 2005. *In Re Spearing Tool and Mfg. Co.*, 412 F.3 653 (6th Cir. 2005) (Apx. 3a). The circuit court denied petitioners' motion for rehearing on December 30, 2005 (Order, Apx. 1a), and this petition for writ of certiorari is due on March 30, 2006.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 6323 of Title 26 is pertinent to this petition. It provides that the Secretary of the United States Treasury shall prescribe the form and content of an IRS lien. Pertinent

regulations are found at 26 C.F.R. § 301.6323(f)-1(d)(2). Under § 6323, a federal tax lien is not valid against "any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor" until a notice of federal tax lien, in proper form, is filed. 26 U.S.C. § 6323(a).

As to a tax lien's proper form, the Internal Revenue Code provides that "the form and content of the notice shall be prescribed by the Secretary." 26 U.S.C. § 6323(f)(3). The Secretary prescribes, in IRS regulations, that the form and content of a Notice of Federal Tax Lien is that of IRS Form 668, "Notice of Federal Tax Lien under Internal Revenue Laws." 26 C.F.R. § 301.6323(f)-1(d)(1). According to the Secretary, the IRS must properly complete his form. To do so, the IRS, "must identify the taxpayer, . . ." by filling in the "Name of Taxpayer" each time it completes that form. C.F.R. § 301.6323(f)-1(d)(2); Form 668.

The federal statute, the Secretary's regulations and Form 668 are silent with regard to the "Name of Taxpayer" to be used on the notice of federal tax lien.

The Uniform Federal Lien Registration Act and Revised Article 9, require (with respect to personal property): (1) that NFTLs be filed with the Michigan Secretary of State and (2) that the Michigan Secretary of State shall, in turn, mark, hold, and index NFTLs in accordance with Revised Article 9, "as if the notice were a financing statement within the meaning of that act." M.C.L. § 211.661-211.665. Financing statements filed with the Michigan Secretary of State (as are all financing statements in all states) are electronically stored and indexed according to the exact name of the debtor as shown on the submitted financing statement. M.C.L. § 440.9519. If the submitted financing statement fails to

identify the debtor by its *registered name*,[3] the lien filing is *deemed to be statutorily defective ("misleading") and hence* invalid.[4]

STATEMENT OF THE CASE

This petition seeks review of the circuit court's ruling in favor of the IRS and against Crestmark in an adversary proceeding relating to the Chapter 11 bankruptcy proceedings of Debtor Spearing Tool and Manufacturing Co. The circuit court reversed the decision of the district court. The district court had ruled in favor of Crestmark, while reversing the decision of the bankruptcy court.

This matter was originally presented to the bankruptcy court on limited facts following a status conference in the bankruptcy court during which the court directed both parties to file cross-motions for summary judgment. (Bankr. R. 39 (TR, Feb. 3, 2003), p. 4-5; Cir. Ct. Apx. 224-225, 232-233). Pursuant to the bankruptcy court's directive and without taking discovery, on March 5, 2003, Crestmark filed its Motion For Summary Judgment with the bankruptcy court requesting that an order be entered, as a matter of law, adjudicating Crestmark's liens as prior to those of the IRS.

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[3] Pursuant to the Michigan Uniform Commercial Code Revised Article 9, with respect to a registered organization, records filed with the Secretary of State are sufficient only if they provide "the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized." M.C.L. §440.9503(1)(a).

[4] An exception, not germane to this petition, provides that the lien is treated as valid if it is nonetheless disclosed by the state. M.C.L. §440.9506(2),(3). See footnote 1, *supra*.

(Bankr. R. 13 (Mot. for Summ. J.); Cir. Ct. Apx. 92; Bankr. R. 14 (Br. in Supp.); Cir. Ct. Apx. 110). The IRS did not file its motion for summary judgment against Crestmark. The bankruptcy court, granted summary judgment, *sua sponte*, in favor of the IRS. In reversing the bankruptcy court, the district court ruled in Crestmark's favor adjudicating the IRS's liens to be subordinate to Crestmark's liens, because standard lien searches would not and did not disclose the IRS's lien notices.

The cause of action relates to changes made by all 50 of the states to the manner in which they mark, hold, index and search personal property liens, including tax liens.[5] These changes were included in the revisions to Article 9 of the Uniform Commercial Code ("UCC") ("Revised Article 9") that became effective in 2001. Under the revised system, all liens are marked, indexed, and held based on the exact name of the entity that is registered in the requisite state office; if a lien is not filed using a debtor's exact registered name, the lien is invalid against the claims of most third parties.[6] Since July 1, 2001, thousands of creditors, small and large, have complied with the new rules without difficulty.

The IRS, like all creditors, has the burden to properly file its lien notice before its lien is given effect against third parties. The IRS, like all creditors, has the same access, not

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[5] All fifty states have adopted and follow the Revised Article 9. See, Zinnecker, Timothy R., *Resolving Priority Disputes Between The IRS And The Secured Creditor Under Revised Article 9: And the Winner Is . . . ?*, 34 Ariz.St.L.J. 921, 922 (2002). Revised Article 9 was adopted by all fifty states quicker than any uniform law.

[6] See footnote 1, *supra*. NFTLs are indexed and searched as if "a financing statement." M.C.L. §211.665.

inferior access, to the Secretary of States office where the registered name of the debtor is made publicly available to everyone. The IRS, like all creditors, can readily search Secretary of State records to determine the exact name of the taxpayer.[7] The IRS routinely uses and promotes the use, by its employees, of Secretary of State information.

In April 1998 and April 2001, Crestmark entered into lending transactions with the debtor and as collateral, the Debtor granted Crestmark security interests in all of its assets. To perfect its security interests, Crestmark filed financing statements with the Michigan Secretary of State, identifying the Debtor as "Spearing Tool and Manufacturing Co.," the Debtor's exact name registered with the Michigan Secretary of State.

Later, on October 15, 2001, the IRS filed two NFTLs against the Debtor. Each of the NFTLs identified the Debtor as "SPEARING TOOL & MFG COMPANY INC," *not* using the Debtor's exact registered name.

Since the IRS did not use the Debtor's exact registered name in its lien notices, none of the multiple searches requested by Crestmark (and others) and performed by the Michigan Secretary of State (private searches are not permitted) using the Debtor's registered name disclosed the IRS's liens. The same result would occur in every single state of this country. Consequently, Crestmark advanced funds to the Debtor that were subject to the secret tax liens, which respondent now seeks to enforce. Crestmark learned of the IRS's putative tax liens against Crestmark's loan collateral only after the Debtor filed bankruptcy.

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[7] See Section II(C), supra, and accompanying footnotes.

Unfortunately, the circuit court's opinion set forth and relied upon numerous *allegations*, although the truth of those allegations were not stipulated to or even proffered into evidence. Several of the most critical allegations erroneously relied upon by the circuit court are as follows:

1. The circuit court wrote that the use of the registered name on NFTLs would subject the IRS to "different identification requirements--varying with each state's electronic-search technology . . ." 412 F.3d at 657 (Apx. 9a). To the contrary, all 50 states use the same identification requirement: the exact registered name of the debtor. The circuit court's decision confused the tasks of "searching" with "filing" liens. Whether states use differing "search" technology will not affect the name to be identified by the *filer* on its tax lien. A person filing a lien (such as the IRS) is not searching for liens. There is complete and absolute uniformity of the registered name requirement in all 50 states notwithstanding the circuit court's mistaken reliance on the irrelevant possibility of differing state "search" technologies. Each debtor has only one registered name and that name is of public record. The IRS needs to learn only one rule – use the debtor's exact registered name.

2. The circuit court wrote, "Crestmark's February, 2002 search results came back *from the Secretary of State's office* with a handwritten note . . ." (emphasis added) by which the "Michigan Secretary of State's office *recommended* a search using the abbreviations [& Mfg]." (Emphasis in original) 412 F.3d at 655, 656 (Apx. 5a, 8a).

Unfortunately, the circuit court merely relied upon self-serving speculations offered by the IRS. The circuit court's description and adjudication is an extrapolation from an innocent postage-stamp size "post-it" note attached to one of

Crestmark's many search results with no testimony and no corroborative evidence. It is equally or more probable that an employee or agent of Crestmark attached the note later, intending it for another employee.[8] A rule of national importance should not turn on the use of a "post-it" note. One of the main goals of Revised Article 9's rule that a debtor's name has to be exactly right is to provide predictable results from searches, so that searchers can have confidence concerning their place in line.

3. The circuit court attributed to Crestmark an assertion that federal law gives way to state law. 412 F.3d at 655 (Apx. 6a). Rather, petitioners have steadfastly recognized that this issue is governed by federal law.[9] Crestmark's actual argument is presented *infra*.

4. The circuit court wrote, "Crestmark had notice that [the Debtor] sometimes used these abbreviations." (Referring

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[8] Neither the U.S. Bankruptcy Court, nor the U.S. District Court, relied on the "post-it" note in rendering their decisions in this matter. Petitioners have always objected to the IRS's speculation as to the source of the note and, in fact, the IRS did not initially include the note in its appendix to the lower court. Instead, after the parties filed their initial briefs (petitioners not being permitted to file a reply brief), the IRS sought and obtained stipulation to amend the appendix, whereby it added that note and other documents.

[9] In part, Crestmark argued below that, because federal law is silent as to the name identification requirements to be used on an NFTL, the federal courts should adopt or apply the name identification requirement used uniformly by all of the states, i.e., the registered name of the entity as a federal rule of law. That assertion does not argue that state law controls over federal law.

to "&" and "MFG"). 412 F.3d at 656 (Apx. 8a) In actuality, the letters and other documents introduced by the IRS do not show that the debtor ever used the abbreviation "MFG" before the IRS filed its lien notice.

HISTORICAL BACKGROUND

To advance the purpose and policy of the federal tax lien statute, courts have historically applied the "substantial compliance"/"reasonableness" test, which parallels the test used by the states under prior Article 9 of the Uniform Commercial Code. Under that test, the courts had determined that the IRS had fulfilled its notice requirements when "there is *substantial compliance* sufficient to give constructive notice and to alert one of the government's claim." *United States v. Sirico*, 247 F.Supp. 421, 422 (S.D. N.Y. 1965) (emphasis supplied). The "substantial compliance"/"reasonableness" test was consistent with the then existing state law under prior Article 9.[10]

Under the "substantial compliance"/"reasonableness" test, the inquiry was whether a *reasonable search* of the public

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[10] As discussed in the following paragraph of this petition, the cases considering the "substantial compliance"/"reasonableness" test are all contingent on the filing, indexing and search capabilities set up under the state law. *See also*, Zinnecker, Timothy R., *Resolving Priority Disputes Between the IRS and the Secured Creditor Under Revised Article 9: and the Winner Is . . . ?*, 34 Ariz.St.L.J. 921, 932: "[F]ormer Article 9 made no attempt to define 'seriously misleading,' leaving the task to judicial resolution. Not surprisingly, the courts failed to adopt a uniform standard, resulting in inconsistent (and perhaps even irrational) holdings." [Citations omitted]

records would have revealed the notice of federal tax lien. *Haye v. United States*, 461 F.Supp 1168, 1174 (C.D. Cal. 1978); *Reid v. Internal Revenue Service*, 182 B.R. 443, 447 (E.D. Vir. 1995; emphasis supplied). The essential purpose of filing a notice of federal tax lien is to give constructive notice of the tax lien's existence. *In re Bertelt*, 206 B.R. 579, 583 (M.D. Fla. 1996); *Sirico*, 247 F.Supp. at 422.

Under the "substantial compliance"/"reasonableness" test, whether a tax lien was effective to provide notice requires an analysis of state law and procedure and the circumstances relating to the particular filing, indexing and search methods. The district court explained that in *Hudgins v. I.R.S.*, 967 F.2d 973 (4th Cir. 1992), the court "focused on the particular filing system employed by the county and the method a searcher used when searching those records to determine whether a searcher should have had constructive notice of the mistakenly filed tax lien." (Dist. R. 14, Order Reversing the Opinion and Order of the Bankruptcy Court, Apx. 19a). Similarly, the district court noted that in *Whiting-Turner/A.L. Johnson v. P.D.H. Development, Inc.*,184 F.Supp.2d 1368 (M.D. Ga. 2000), that the critical factor in applying the "substantial compliance"/"reasonableness" test was the manner in which the state organized and searched its lien index. (*Id.*, Apx. 19a). Applying these factors, the district court correctly determined here that a reasonable searcher would not have found the NFTLs and, therefore, that the NFTLs did not provide the requisite notice to Crestmark. (*Id.*, Apx. 22a). Other courts are in accord. *In the Matter of Hugues J. de la Vergne, II, Ducote, Trustee v. United States*, 156 B.R. 773, 777 (E.D. La. 1993) (applying Louisiana's public records doctrine to determine the reasonableness of a records search); *Reid*, 182 B.R. at 447 (applying Virginia circuit court's procedure for indexing lien filings); *Kivel v. United States*, 878 F.2d 301, 304 (9th Cir.1989) (applying

California law stating that determination of reasonableness of search is mixed question of law and fact); *F.P. Baugh, Inc. v. Little Lake Lumber Co.*, 185 F.Supp. 628 (N.D. Cal. 1960), *aff'd in part and rev'd in part on other grounds*, 297 F.2d 692 (9th Cir. 1961), *cert. denied*, 370 U.S. 909, 82 S.Ct. 1256, 8 L.Ed.2d 404 (1962), (applying California's recording statute); *United States v. Ruby Luggage*, 142 F.Supp. 701 (E.D.N.Y. 1954) (applying New York law). Accordingly, under the "substantial compliance"/"reasonableness" test, the courts looked to state law when determining where and how an NFTL must be filed, indexed, and searched. If it is filed and indexed in such a way that a search of the records does not disclose the lien, then the tax lien is invalid against the holder of a security interest in that collateral.

The "substantial compliance"/"reasonableness" test proved to be inconsistent and unpredictable, sometimes resulting in irrational results. Revised Article 9 was enacted to improve commercial transactions by making debtor identification requirements uniform throughout the country and, thus, making search results certain. The exact registered names must now be used to identify debtors for the lien records.[11] This change enhances certainty for future lien holders of the

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[11] See Zinnecker, 34 Ariz.St.L.J. at 932-933 (citing U.C.C. § 9-506(c) (2001)) stating "[u]nlike its predecessor, revised Article 9 provides a standard against which the nature of an error or a name change can be measured" and concluding that "[a] financing statement is seriously misleading if a search against the debtor's correct name fails to disclose the filing"; *see also*, M.C.L. § 440.9506(2), (3).

debtor, including the IRS, through a methodology which is not unduly burdensome to the creditor perfecting its lien.[12]

REASONS FOR GRANTING THIS PETITION

INTRODUCTION

This petition raises an issue of national importance. The bedrock issue is the obligation of the IRS to give notice to the public that it has imposed a lien by filing an NFTL. Implicit within the issue is the need, in the commercial world, for uniformity and certainty for obtaining notice of liens on personal property. Participants in the commercial world follow one rule when filing liens - identifying the debtor by its exact registered name - but, following the circuit court's ruling in this case, the IRS follows a different rule - identifying the debtor by any name ever used by the debtor

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[12] However, Revised Article 9 does allow for less than strict compliance, if the search actually reveals the lien in spite of the filer's failure to comply, placing the risk upon the noncompliant filer. The benefits of the Revised Article 9 standard were recognized from its inception. "[R]evised Article 9 carefully balances the interests of searchers and filers. The statutes recognize that filers will make errors despite exercise of care and despite the assistance derived from well-designed new forms, so the statute does not provide an absolute requirement of perfection. [M.C.L. § 440.9506(3).] At the same time, it does not burden searchers with the obligation to dream up every potential error and name variation and perform searches under all possibilities. *Revised Article 9 allows a searcher to rely on a single search conducted under the correct name of the debtor and penalizes filers only for errors that result in the nondisclosure of the financing statement in a search under the correct name.* Sigman, Harry C., *The Filing System Under Revised Article 9*, 61 Am. Bankr. L. J. 61, 73 (1999) (Emphasis added).

and any abbreviation thereof. This Court is called upon to determine whether the IRS must utilize the same method for identifying a lien-debtor that is utilized by every other lienor in every state, to provide public notice of an otherwise secret tax lien.

Revised Article 9 provides that a lien shall identify the debtor by its registered name, as filed in the requisite state office (in Michigan: the Secretary of State). This statute is motivated by computer generated search technology whereby (1) it is no imposition for the lienor to obtain the debtor's exact registered name, and (2) the public is able to search for liens with absolute certainty that all valid liens will be disclosed. Inasmuch as there is no federal law that specifies the manner in which the IRS is to identify the debtor on its NFTLs, petitioners maintain, and argued below, that the IRS should be held accountable to the same uniform standard that governs every other lien creditor in this country, particularly when that practice is consistent with the intentions of Congress.

Although the manner of identifying taxpayers/debtors on lien filings may, initially, seem to present a hyper-technical issue, this issue is of paramount importance to providing notice of property interests under the nationally accepted and utilized system of conducting commercial transactions. Under Revised Article 9, nothing is more important than the name used on a lien filing, because the filing is marked, held and indexed solely according to the name used on that filing.

This Court's decision is of national importance and crucial to the effective business practices of all creditors, including all lenders and the IRS alike. Any decision that deviates from the uniform identification requirement will create uncertainty for creditors and effectively dismantle the existing lien system

universally relied upon throughout this country. The exceptional importance of this issue is recognized by the parties and by the amici curiae[13] that participated in proceedings before the circuit court: the American Bankers Association, the Commercial Finance Association, the International Factoring Association, the Michigan Bankers Association, the Tennessee Bankers Association, the Ohio Bankers Association, and the Kentucky Bankers Association.

The importance is further demonstrated by this Court's decision in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979), where this Court recognized the necessity of avoiding secret tax liens. The circuit court's opinion conflicts with this Court's *Kimbell Foods* holding.

I. THE ISSUE PRESENTED TO THIS COURT IS ONE OF NATIONAL IMPORTANCE.

The crux of this case is the obligation of the IRS to provide lien notice to the commercial industry, so that the commercial industry will be able to locate the IRS's liens and make decisions based on full knowledge. This Court's decision will significantly impact lenders throughout this country, the IRS, and the parties involved in a wide variety of general or commercial transactions (such as asset purchases, mergers and acquisitions), not only as to transactional outcomes, but also, as to adverse cost and risk management

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[13] The IRS has stated, "[t]his case presents a novel and complex issue of significant administrative importance to the administration of the tax laws . . ." IRS's App. Br. in the circuit court, at viii. See also, the numerous amicus briefs filed below by associations representing a wide array of commercial interests.

decisions. In all of these cases, the commercial industry needs certain knowledge of the existence of NFTLs. Accordingly, "notice is the key." *In re Bertelt*, 206 B.R. 579, 583 (M.D. Fla. 1996).

As a matter of national importance, this Court should grant certiorari. The circuit court's ruling intensifies uncertainties in the commercial world by requiring citizens to search all names which might, only theoretically, be used by a debtor and all "recognized" abbreviations of terms appearing in those names. Under the circuit court's ruling, a citizen will never be certain that it has met the threshold burden required by the circuit court's holding, and a citizen will never be certain that it has searched the name used by the IRS to identify the taxpayer. Furthermore, the costs to citizens for such searches and the administrative expenses for requesting and reviewing such searches will certainly discourage and, in many cases, prohibit, commercial development. All of those uncertainties and costs can be and should be overcome by the simple requirement that the IRS provide notice of its NFTLs by filing under the registered name of the debtor (something that the IRS's own manual confirms is feasible and practical).

II. THE CIRCUIT COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *KIMBELL FOODS* AND DECISIONS OF LOWER APPELLATE COURTS, AND IN ORDER TO EFFECTUATE THE INTENT OF CONGRESS, THE IRS SHOULD BE REQUIRED TO COMPLY WITH THE SAME DEBTOR IDENTIFICATION REQUIREMENTS AS ARE ALL OTHER LIEN CREDITORS.

A. THE CIRCUIT COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *KIMBELL FOODS* AND DECISIONS OF LOWER APPELLATE COURTS.

The circuit court incorrectly interpreted *Kimbell Foods* to stand for the proposition that it is "Supreme Court precedent that the federal government's interest in prompt, effective tax collection trumps the banks' convenience in loan collection." *In re: Spearing Tool and Mfg. Co.*, 412 F.3d 653, 657 (6th Cir. 2005) (Apx. 3a). *Kimbell Foods* addressed the issue of whether a uniform national rule should be fashioned to protect federal interests by providing heightened lien priorities to lending programs administered by the Small Business Administration ("SBA") and Farmers Home Administration ("FHA"). The statutes authorizing the SBA and FHA lending programs did not specify the manner to resolve priority disputes between those lending programs and private interests. According to this Court, "it is precisely when Congress has not spoken 'in an area comprising issues substantially related to an established program of government operation,'" [that federal courts must] "fill the interstices of federal legislation 'according to their own standards.'" *Kimbell Foods*, 440 U.S. 727 (citation omitted). This Court then expressed three criteria relative to a determination of the proper manner to fill in the legal void: (1) whether a uniform rule is needed, (2) whether application of state law would frustrate specific objectives of the federal programs and (3) the extent to which

application of a federal rule would disrupt commercial relationships predicated on state law. *Kimbell Foods*, 440 U.S. at 728-729. This Court also made clear that "in fashioning federal principles to govern areas left open by Congress, [the court's] function is to effectuate congressional policy." *Kimbell Foods*, 440 U.S. at 738.

With respect to this case, it is undisputed that federal law defines the form and content of a notice of federal tax lien; that federal law does not define the manner in which the IRS should identify the taxpayer on its notices of federal tax liens; and that there is a necessity for uniformity in the commercial world, both as to commercial creditors and the IRS alike. As recognized by this Court in *Kimbell Foods* and as further discussed in Section II(B) of this petition, Congress has, through the Tax Lien Act, sought to "improve the status of private secured creditors" and prevent impairment of commercial financing transactions by modernizing the relationship of federal tax liens to the interests of other creditors. *Kimbell Foods*, 440 U.S. at 738, citing S. Rep. No. 708, 89th Cong., 2d Sess., 1-2 (1966).

The circuit court filled in the void resulting from federal law's failure to define the manner in which the IRS must identify the taxpayer on its NFTLs, by permitting the IRS to identify the taxpayer using trade names, abbreviations and any other name that, at any time, is used by the taxpayer. The circuit court's rule would not further the goal of uniformity, but, instead, would result in different rights for different citizens, depending on the knowledge of the particular citizen of the particular taxpayer. Moreover, in rendering its ruling, the circuit court failed to follow this Court's *Kimbell Foods* precedent which dictates that courts are required to fashion federal principles left open by Congress in such a manner as to "effectuate congressional policy." *Kimbell Foods*, 440

U.S. at 738 (holding that, absent a Congressional policy favoring protection of the SBA and FHA, non-discriminatory priority rules fashioned under the UCC should be applied).[14] Contrary to the circuit court's interpretation of *Kimbell Foods*, that case does not mandate a holding that "federal government's interest in prompt, effective tax collection trumps the banks' convenience in loan collection." Instead, it requires an examination of applicable Congressional policy.

This case must not be misunderstood as a choice between lender convenience in collecting delinquent loans and IRS convenience in tax collection. While one purpose of the Tax Lien Act is to ensure the prompt collection of taxes, that purpose is not intended to be a "trump card" that automatically tramples all public and private rights. Congress has provided specific rights to secured creditors under the Tax Lien Act, and it has expressed strong policies against secret liens and in favor of commercial development.[15] The circuit court's holding subverts the Congressional objectives described in this petition (further addressed in Section II(B), *infra*) and announced by this Court in *Kimbell Foods*.

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[14] The circuit court relied on *Kimbell Foods* for the proposition that "[t]he overriding purpose of the tax lien statute obviously is to ensure prompt revenue collection," 412 F.3d at 656, without appreciating *Kimbell Foods*' express limitations to that principle, e.g. "[b]usinessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved." *Kimbell Foods* at 739.

[15] E.g., under the Tax Lien Act, 26 U.S.C. § 6321, et. seq., a federal tax lien is not valid against a "holder of a security interest" unless a notice of tax lien is filed, in proper form. § 6323(a).

In addition to the conflict with *Kimbell Foods*, the circuit court's opinion also conflicts with rulings by other lower appellate courts. On the one hand, other circuit courts have recognized and imposed a duty on the IRS to use reasonable diligence in ascertaining information used on its lien notices. *See, e.g.*, *Wallin v. C.I.R.*, 744 F.2d 674, 676-78 (9th Cir. 1984) (In filing a notice of tax deficiency, the "IRS failed to meet the reasonable diligence standard by not performing a computer search that included the social security numbers" shown on a taxpayer's tax return"). The circuit court's ruling, on the other hand, imposes no burden of any kind on the IRS to investigate the exact registered name of the taxpayer or to make any effort whatsoever to utilize the registered name of the taxpayer, based on information reasonably available to the IRS.

B. The Circuit Court's Decision Disregards Exceptionally Important Policies Underlying the Tax Lien Act as Expressed by Congress and this Court.

The *sine qua non* of the circuit court's decision is its unquestioning adherence to facilitating the IRS's alleged collection concerns. The circuit court disregarded Congress' strong and explicit policies: (a) against secret liens and (b) favoring the advancement of commerce.

First, this Court has examined and explained Congress' intent under the Tax Lien Act as follows:

> [t]he 1966 amendments to the Tax Lien Act bespeak a strong condemnation of secret liens, which unfairly defeat the expectations of innocent creditors and frustrate "the needs of our citizens for certainty and convenience in the legal rules governing their

> commercial dealings." 112 Cong. Rec. 22227 (1966) (remarks of Rep. Byrnes); *cf. United States v. Speers,* 382 U.S. 266, 275, 86 S.Ct. 411, 416, 15 L.Ed.2d 314 (1965) (referring to the "general policy against secret liens"). These policy concerns shed light on how Congress would want the conflicting statutory provisions to be harmonized: "Liens may be a dry-as-dust part of the law, but they are not without significance in an industrial and commercial community where construction and credit are thought to have importance. One does not readily impute to Congress the intention that many common commercial liens should be congenitally unstable." [citation omitted].

United States v. Romani, 523 U.S. 517, 534, 118 S.Ct. 1478, 140 L.Ed.2d 710 (1998) (ruling that under the Tax Lien Act, rather than the federal priority statute, an unrecorded federal tax lien did *not* have priority over a state judgment lien). Notwithstanding a policy for prompt tax collection, in *United States v. Speers,* 382 U.S. 266, 275, 86 S.Ct. 411, 416, 15 L.Ed.2d 314 (1965), this Court invalidated an NFTL even though "the consequence of depriving the United States of claimed priority for its secret lien is to improve the relative position of creditors . . .." 382 U.S. at 275. Other federal courts have similarly recognized that:

> The policy underlying §6323 corresponds to the policy underlying the notice required in general commercial practice. "Modernized by the Federal Tax Lien Act of 1966, the tax lien noticing system attempts to conform federal tax lien provisions to the U.C.C.'s concepts." Generally, a tax lien is valid as between the Internal Revenue Service and the taxpayer. The validity of a tax lien against creditors of the taxpayer

> parallels commercial lending's policy of providing notice to third parties of an existing lien. *Notice is the key, and §6323 adheres to the notice systems implemented by the states. "Notice of the federal tax lien protects would be purchasers and others against secret liens in the government's favor."*

In *re Bertelt*, 206 B.R. 579, 583 (M.D. Fla. 1996), citing *In re May Reporting Services, Inc.*, 115 B.R. 652, 656 (D.S.D. 1990) (emphasis added).

Second, Congress has stated that it intended the Tax Lien Act as "[i]n part an attempt to conform the lien provisions of the internal revenue laws to the concepts developed in the Uniform Commercial Code. It represents an effort to adjust the provisions in the internal revenue laws relating to the collection of taxes of delinquent persons to the more recent developments in commercial practice (permitted and protected under State law) and to deal with a multitude of technical problems which have arisen over the past 50 years." S. Rep. No. 1708, 89th Cong., 2d Sess. 1-2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3722, 3722-23. This Court has further recognized that:

> The Federal Tax Lien Act of 1966, 80 Stat. 1125, as amended, 26 U.S.C. § 6323, provides further evidence that treating the United States like any other lender would not undermine federal interests. These amendments modified the Federal Government's preferred position under the choateness and first-in-time doctrines, and recognized the priority of many state claims over federal tax liens. In enacting this legislation, Congress sought to "improv[e] the status of private secured creditors" and prevent impairment of commercial financing transactions by

> "moderniz[ing] . . . the relationship of Federal tax liens to the interests of other creditors." [Citation omitted.]

Kimbell Foods, 440 U.S. at 738. The federal interests and the UCC can be easily "conform[ed]" by a rule that requires the IRS to use the exact registered name of an entity on its NFTLs – a task that requires minimal effort and fits easily into the UCC system used in every state.[16]

Hence, the circuit court's pronouncement that tax collection "trumps" all other public and private interests is contrary to clear legislative and judicial precedent. Congress has legislated, and this Court has confirmed, the need to avoid secret tax liens and to foster commercial development. These principles can and should hold sway over the unpredictable rule adopted by the circuit court.[17]

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[16] See, Section II(C) and accompanying footnotes.

[17] Although the IRS has taken the position that it uses the name on tax returns to determine the name it uses on its NFTLs, that practice is not documented, nor is it a fair, open practice which allows creditors to search and know with certainty whether an NFTL has been filed. Had the IRS used the most recent name of the debtor on its NFTLs, Crestmark would have found the NFTLs. Between 1994 and October 15, 2001, the date of filing of the IRS's NFTLs, the debtor's tax returns used: Spearing Tool & Manufacturing. Debtor's 2001 third quarter tax return apparently used: Spearing Tool & MFG Company. But, that was not filed until November 13, 2001, *after* the IRS filed its NFTLs. Assuming arguendo that the IRS meets its burden of reasonable diligence by using the name on the debtor's tax return (as argued by the IRS), the IRS should have filed its NFTLs using: Spearing Tool & Manufacturing. Had the IRS done that, *the IRS's NFTLs would have been revealed by Crestmark's searches*. Contrary to the circuit

C. In Accordance with *Kimbell Foods* and Other Federal Courts, this Court Should, as a Matter of Federal Policy, Require the IRS to Comply With the Same Debtor Identification Requirements as do All Other Lien Creditors.

The registered name identification requirement of Revised Article 9 provides a uniform and easily implemented standard for identification of the debtor for all lien creditors, both commercial and governmental.[18] Use of the name identification provisions of Revised Article 9 promotes uniform policy and practice, and provides stability by way of

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court's ruling, there is no evidence that during the relevant period, Michigan's search logic distinguished between "&" and "and."

[18] See, *In re Kinderknecht*, 308 B.R. 71 (B.A.P. 10th Cir. 2004)("[T]he intent [of the name identification provisions of Revised Article 9 is] to clarify when a debtor's name is sufficient shows a desire to foreclose fact-intensive tests, such as those that existed under the former Article 9 of the UCC, inquiring into whether a person conducting a search would discover a filing under any given name. Requiring a financing statement to provide a debtor's legal name is a clear cut test that is in accord with that intent"). The Kansas Supreme Court came to the same conclusion in March of this year in *Pankratz Implement Company v. Citizens National Bank*, ____ P.3d ____(Kan. 2006). ("We believe that the language used by the legislature and the intent behind the adoption of the most recent amendments had the effect of shifting responsibility of getting the name on the financing statement right to the filing party, thereby enabling the searching party to rely upon that name and eliminating the need for multiple searches using variations of the debtor's name. This would have the effect of providing more certainty in the commercial world and reducing litigation as was required prior to the amendments to determine whether an adequate search was made.")

predictability in the commercial world. Indeed, the IRS's own manual exhorts the use of the taxpayer's correct name.

Requiring the use of the registered name of the taxpayer is entirely consistent with the tax code and does not change the design of the form or the contents included in the NFTL prescribed by the Secretary of the Treasury's regulations (IRS Form 668). It furthers the underlying purpose of the federal law and embodies Congress' intent to avoid secret liens and to foster uniformity. The application of this uniform and beneficial state law development regarding the identification of a debtor on state filed liens does not conflict with the purpose and policy of the federal tax scheme. It promotes it by providing a uniform and predictable system for all lien creditors, including the IRS.

The IRS's own manual expresses that the legal name should be used on NFTLs, and each taxpayer's legal name, if not already possessed by the IRS, is easily obtainable (online) from the Secretaries of State, a source that the IRS praises and uses as part of its routine operations. The lower appellate court places the entire risk of finding tax liens on secured creditors and misconstrues or ignores the IRS's duty to properly *file* its NFTLs. It is irrefutable that the IRS, as the filer of its NFTLs, is in the best position to make certain that its NFTLs are capable of being found by a search of the records. The IRS, and no one else, has absolute control of the name it types on an NFTL. In contrast, a searcher of the records who is forced to search not only the registered legal name of a debtor, but also all trade names, other known names and all abbreviations for those names, is in a much more precarious position. Even if searching all such names is administratively feasible, the creditor will never have certainty that it fully completed a search or that an NFTL has not been filed under a slight variation of the searched names.

The courts recognize the duty of the IRS "to exercise reasonable diligence to ascertain" information that it is required to fill in on its tax notices. *Wallin,* 744 F.2d at 676-78 (in filing a notice of tax deficiency the "IRS failed to meet the reasonable diligence standard by not performing a computer search that included the social security numbers"); *McPartlin v. C.I.R.,* 653 F.2d 1185 (7th Cir.1981) (IRS failed to exercise reasonable diligence in ascertaining information for deficiency notice because, in part, an agent was aware of taxpayer's correct address); *Davis v. United States*, 728 F.Supp. 513 (C.D. Ill. 1989) (imposing duty on the IRS to refile an NFTL when IRS aware that taxpayer's name had changed – "it would have been simple for the IRS to run a computer check. . ."); *Kennedy v. United States*, 403 F.Supp. 619 (W.D. Mich. 1975) (IRS "should have been more diligent" in ascertaining address used on deficiency notice).

The IRS, like all creditors, has the burden to properly file its lien notice, before its lien is given effect against third parties. The IRS, like all creditors, can readily search Secretary of State records to determine the exact name of the taxpayer.[19] The IRS has the same access, as everyone else, to the Secretary of State office where the registered name of the debtor is publicly available. There is no dispute that the IRS has access to and utilizes the records available from Secretaries of State. The IRS uses the Secretaries of State to file its NFTLs, and its own manual states that Secretary of

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[19] The IRS cannot argue, in good faith, that its ability to promptly collect taxes will be impaired by fulfilling this duty. In *Crum v. C.I.R.*, 635 F.2d 895 (C.A.D.C. 1980), the Court of Appeals for the District of Columbia found that as part of the IRS's duty to use reasonable diligence in ascertaining information, the IRS should have performed a search which would have taken *six weeks*.

State offices have "proven to be one of the most effective sources available for corporate accounts." IRM Handbook 5919 Locator Services Subsection 24(12); Int. Rev. Man. 5.1.18.11. The IRS advises its offices to "*use Secretary of State information as one of their first locator sources on corporate accounts*" and that "all states require that corporations register at the time of their incorporation." *Id. See also*, Int. Rev. Man. 5.1.18.11 (noting "All states require that corporations register at the time of their incorporation"). Verifying the debtor's entity information is not an imposition but a routine part of the IRS's practice.

The IRS's duty of reasonable diligence necessitates, at a minimum, that the IRS confirm the registered name of the taxpayer and use that information on its NFTLs. Rather than impose on creditors all risk of finding a lien, the IRS should be required to file its NFTLs under the taxpayer's registered name. That requirement is consistent with Congress' intent of avoiding secret liens and it furthers "the needs of our citizens for certainty and convenience in the legal rules governing their commercial dealings." *Romani*, 523 U.S. at 534 (citations omitted). Revised Article 9 has provided a uniform, nationally implemented and accepted manner for identifying debtors, and "[t]he prudent course is to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *Kimbell Foods*, 440 at 740.

III. SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED TO THE IRS, SUA SPONTE, AND BASED ON UNADJUDICATED FACTUAL ALLEGATIONS.

The circuit court should not have adopted the bankruptcy court's *sua sponte* grant of summary judgment to the IRS. The bankruptcy court ordered both Crestmark and the IRS to

file cross motions for summary judgment to be based on *undisputed facts*. The IRS did not file a motion. Rather, the IRS defended Crestmark's motion by raising *disputed facts* and conjecture. The bankruptcy court, and thereafter the circuit court (reversing the district court), relied upon those disputed facts and the conjecture argued by the IRS.[20] Crestmark has been deprived of its right to test, by cross-examination and otherwise, those unresolved factual allegations and conjectures which were improperly relied upon by the bankruptcy court and circuit court in rendering their decisions.

The granting of summary judgment *sua sponte* is "a practice [the courts] discourage." *Employers Ins. of Wausau v. Petroleum Specialties, Inc.*, 69 F.3d 98, 105 (6th Cir.1995). A motion for summary judgment may be granted *sua sponte* only "so long as the losing party was on notice that [it] had to come forward with all of [its] evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Crestmark was not on notice that the bankruptcy court would grant summary judgment on a *sua sponte* basis in favor of the IRS. Although directed by the bankruptcy court to file a motion for summary judgment, the IRS did not do so. Crestmark had no opportunity to discover or present facts and law opposing summary judgment in favor of the IRS.

Moreover, the discovery period had not ended. Based on the circuit court's ruling, it is evident that genuine issues of

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[20] Several of the most critical allegations erroneously relied upon by the circuit court are set forth in the Statement of the Case, *supra*.

material fact existed that the circuit court needed to know in order to properly decide this case. As a common principle of law, before ruling on summary judgment motions, a court must afford the parties adequate time for discovery, in light of the circumstances of the case. See, *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986) (stressing importance of allowing ample time for discovery); *Celotex*, 477 U.S. at 322, 326. Parties may base their appeals on the lack of opportunity to discover evidence necessary to establish a genuine issue of material fact. *Id.*

There are many allegations asserted by the IRS which the circuit court adopted and cited as material *facts*, but which were *not established* or introduced into evidence prior to the circuit court's adjudication of them. This case was decided on *naked factual assertions* by the IRS that were not included among the undisputed facts for the restricted purpose of Crestmark's motion for summary judgment.

The most egregious error is found in the circuit court's statement regarding a reputed burden that the IRS would shoulder if the court should rule for Crestmark, "A requirement that tax liens identify a taxpayer with absolute precision would be unduly burdensome to the government's tax-collection efforts. Indeed, such a requirement might burden the government at least as much as Crestmark claims it would be burdened by having to perform multiple lien searches." *In Re Spearing Tool*, 412 F.3 at 656 (Apx. 9a). The circuit court's statement is predicated on a record that included no consideration of evidence regarding the purported burden on the IRS. Even further, the circuit court's statement that subjecting the IRS to the UCC criteria for debtor identification would subject the federal government to different identification requirements—varying with each state's electronic-search technology, is both without evidentiary support and *perverse*. The IRS would be subject to precisely one requirement, identical in all jurisdictions; the principle of uniformity would be achieved to a greater degree than ever before.

RELIEF

Petitioners request that this Court grant writ of certiorari.

Respectfully Submitted:

Steven P. Ross (P 27715)
Counsel of Record
SHAHEEN, JACOBS, & ROSS, P.C.
1425 Ford Building, 615 Griswold
Detroit, Michigan 48226-3993
(313) 963-1301

Co- Counsel:
HELLER EHRMAN WHITE & McAULIFFE LLP
Steven O. Weise, Esq.
RICHARD E. SHAW, P.C.
Richard E. Shaw, Esq.

Attorneys for Petitioners Crestmark Bank and
Crestmark Financial Corporation

Dated: March 30, 2006

APPENDIX A

UNITED STATES COURT OF APPEAL FOR THE SIXTH CIRCUIT

No. 04-1053

[December 30, 2005]

In re: Spearing Tool and Manufacturing Co., Inc.
Debtor.

United States of America,
Appellant,

v.

Crestmark Bank; Crestmark Financial Corporation.
Appellees.

ORDER

BEFORE: BOGGS, Chief Judge; COOK and Bright,* Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

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* Hon. Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEAL FOR THE SIXTH CIRCUIT

No.04-1053

[June 21, 2005]

In re: Spearing Tool and Manufacturing Co., Inc.	)
Debtor.	)
	)
United States of America,	)
Appellant,	)
	)
v.	)
	)
Crestmark Bank; Crestmark Financial Corporation.	)
Appellees.	)

On Appeal from the United States Court for the Eastern District of Michigan at Detroit.

BEFORE: BOGGS, Chief Judge; COOK and Bright,* Circuit Judges.

OPINION

COOK, Circuit Judge. In this case arising out of bankruptcy proceedings, the government appeals the district court's reversal of the bankruptcy court's grant of summary judgment for the government. For the following reasons, we reverse the district court, and affirm the bankruptcy court.

I. Background and Procedural History

In April 1998, Spearing Tool and Manufacturing Co. and appellee Crestmark[1] entered into a lending agreement, which granted Crestmark a security interest in all of Spearing's assets. The bank perfected its security interest by filing a financing statement under the Uniform Commercial Code, identifying Spearing as "Spearing Tool and Manufacturing Co.," its precise name registered with the Michigan Secretary of State.

In April 2001, Spearing entered into a secured financing arrangement with Crestmark, under which Crestmark agreed to purchase accounts receivable from Spearing, and Spearing granted Crestmark a security interest in all its assets. Crestmark perfected its security interest by filing a UCC

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* Hon. Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

[1] We refer to both Crestmark Bank and Crestmark Financial Corporation as "Crestmark," the difference between them being immaterial here.

financing statement, again using Spearing's precise name registered with the Michigan Secretary of State.

Meanwhile, Spearing fell behind in its federal employment-tax payments. On October 15, 2001, the IRS filed two notices of federal tax lien against Spearing with the Michigan Secretary of State. Each lien identified Spearing as "SPEARING TOOL & MFG. COMPANY INC.," which varied from Spearing's precise Michigan-registered name, because it used an ampersand in place of "and," abbreviated "Manufacturing" as "Mfg.," and spelled out "Company" rather than use the abbreviation "Co." But the name on the IRS lien notices was the precise name Spearing gave on its quarterly federal tax return for the third quarter of 2001, as well as its return for fourth-quarter 1994, the first quarter for which it was delinquent. For most of the relevant tax periods, however, Spearing filed returns as "Spearing Tool & Manufacturing"—neither its precise Michigan-registered name, nor the name on the IRS tax liens.

Crestmark periodically submitted lien search requests to the Michigan Secretary of State, using Spearing's exact registered name. Because Michigan has limited electronic-search technology, searches disclose only liens matching the precise name searched—not liens such as the IRS's, filed under slightly different or abbreviated names.[2] Crestmark's February 2002 search results came back from the Secretary of State's office with a handwritten note stating: "You may wish to search using Spearing Tool & Mfg. Company Inc." But Crestmark did not search for that name at the time, and its

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[2] The search engine ignores various "noise words" and their abbreviations, including "Incorporated" and "Company," but not "Manufacturing" or "and."

exact-registered-name searches thus did not reveal the IRS liens. So Crestmark, unaware of the tax liens, advanced more funds to Spearing between October 2001 and April 2002.

On April 16, 2002, Spearing filed a Chapter-11 bankruptcy petition. Only afterward did Crestmark finally search for "Spearing Tool & Mfg. Company Inc." and discover the tax-lien notices. Crestmark then filed the complaint in this case to determine lien priority. The bankruptcy court determined the government had priority; the district court reversed. The questions now before us are whether state or federal law determines the sufficiency of the IRS's tax-lien notices, and whether the IRS notices sufficed to give the IRS liens priority.

II. Federal law controls whether the IRS's lien notice sufficed.

Crestmark argues Michigan law should control the form and content of the IRS's tax lien with respect to taxpayer identification. The district court, though it decided in favor of Crestmark on other grounds, rightly disagreed.

When the IRS files a lien against a taxpayer's property, it must do so "in one office within the State . . . as designated by the laws of such State, in which the property subject to the lien is situated." 26 U.S.C. § 6323(f)(1)(A). The Internal Revenue Code provides that the form and content "shall be prescribed by the [U.S. Treasury] Secretary" and "be valid *notwithstanding any other provision of law regarding the form or content of a notice of lien.*" 26 U.S.C. § 6323(f)(3) (emphasis added). Regulations provide that the IRS must file tax-lien notices using IRS Form 668, which must "identify the taxpayer, the tax liability giving rise to the lien, and the date the assessment arose." 26 C.F.R. § 301.6323(f)-1(d)(2).

Form-668 notice "is valid notwithstanding any other provision of law regarding the form or content of a notice of lien. For example, omission from the notice of lien of a description of the property subject to the lien does not affect the validity thereof even though State law may require that the notice contain a description of property subject to the lien." § 301.6323(f)-1(d)(1); *see also United States v. Union Cent. Life Ins. Co.*, 368 U.S. 291, 82 S. Ct. 349, 1962-1 C.B. 328, 296, 7 L. Ed. 2d 294 (1961) (Michigan's requirement that tax liens describe relevant property "placed obstacles to the enforcement of federal tax liens that Congress had not permitted.").

The plain text of the statute and regulations indicates Form-668 notice suffices, regardless of state law. We therefore need only consider how much specificity federal law requires for taxpayer identification on tax liens.

III. The notice here sufficed.

An IRS tax lien need not perfectly identify the taxpayer. *See, e.g., Hudgins v. IRS* (*In re Hudgins*), 967 F.2d 973, 976 (4th Cir. 1992); *Tony Thornton Auction Serv., Inc. v. United States*, 791 F.2d 635, 639 (8th Cir. 1986); *Reid v. IRS* (*In re Reid*), 182 B.R. 443, 446 (Bankr. E.D. Va. 1995). The question before us is whether the IRS's identification of Spearing was sufficient. We conclude it was.

The critical issue in determining whether an abbreviated or erroneous name sufficiently identifies a taxpayer is whether a "reasonable and diligent search would have revealed the existence of the notices of the federal tax liens under these names." *Tony Thornton*, 791 F.2d at 639. In *Tony Thornton*, for example, liens identifying the taxpayer as "Davis's Restaurant" and "Daviss (sic) Restaurant" sufficed to identify

a business correctly known as "Davis Family Restaurant." *Id.* In *Hudgins*, the IRS lien identified the taxpayer as "Hudgins Masonry, Inc." instead of by the taxpayer's personal name, Michael Steven Hudgins. This notice nonetheless sufficed, given that both names would be listed on the same page of the state's lien index. 967 F.2d at 977.

Crestmark argues, and we agree, that those cases mean little here because in each, creditors could search a physical index and were likely to notice similar entries listed next to or near one another—an option which no longer exists under Michigan's electronic-search system. So the question for this case becomes whether Crestmark conducted a reasonable and diligent electronic search. It did not.

Crestmark should have searched here for "Spearing Tool & Mfg." as well as "Spearing Tool and Manufacturing." "Mfg." and the ampersand are, of course, most common abbreviations— so common that, for example, we use them as a rule in our case citations. Crestmark had notice that Spearing sometimes used these abbreviations, and the Michigan Secretary of State's office *recommended* a search using the abbreviations. Combined, these factors indicate that a reasonable, diligent search by Crestmark of the Michigan lien filings for this business would have disclosed Spearing's IRS tax liens.

Crestmark argues for the unreasonableness of requiring multiple searches by offering the extreme example of a name it claims could be abbreviated 288 different ways ("ABCD Christian Brothers Construction and Development Company of Michigan, Inc."). Here, however, only two relevant words could be, and commonly are, abbreviated: "Manufacturing" and "and"—and the Secretary of State specifically recommended searching for those abbreviations.

We express no opinion about whether creditors have a general obligation to search name variations. Our holding is limited to these facts.

Finally, we note that policy considerations also support the IRS's position. A requirement that tax liens identify a taxpayer with absolute precision would be unduly burdensome to the government's tax-collection efforts. Indeed, such a requirement might burden the government at least as much as Crestmark claims it would be burdened by having to perform multiple lien searches. "The overriding purpose of the tax lien statute obviously is to ensure prompt revenue collection." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 734-35, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979). "[T]o attribute to Congress a purpose so to weaken the tax liens it has created would require very clear language," which we lack here. *Union Central*, 368 U.S. at 294. Further, to subject the federal government to different identification requirements—varying with each state's electronic-search technology—"would run counter to the principle of uniformity which has long been the accepted practice in the field of federal taxation." *Id.*

Crestmark urges us to require IRS liens to meet the same precise-identification requirement other lien notices now must meet under Uniform Commercial Code Article 9. *See* Mich. Comp. Laws § 440.9503(1) ("A financing statement sufficiently provides the name of [a] debtor [that is] a registered organization, only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized."). We decline to do so. The UCC applies to transactions "that create[] a security interest in personal property or fixtures *by contract*." Mich. Comp. Laws § 440.9109(1)(a) (emphasis added). Thus, the IRS

would be exempt from UCC requirements even without the strong federal policy favoring unfettered tax collection.

More importantly, the Supreme Court has noted that the United States, as an involuntary creditor of delinquent taxpayers, is entitled to special priority over voluntary creditors. *See, e.g., Kimbell Foods*, 440 U.S. at 734-35, 737-38. Thus, while we understand that a requirement that the IRS comply with UCC Article 9 would spare banks considerable inconvenience, we conclude from Supreme-Court precedent that the federal government's interest in prompt, effective tax collection trumps the banks' convenience in loan collection.

IV. Conclusion

We reverse the district court and affirm the bankruptcy court's grant of summary judgment for the government.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States District Court No. 03-72070

[Filed November 5, 2003]

In re: Spearing Tool and Manufacturing Co., Inc.	)
Debtor.	)
	)
United States of America,	)
Appellant,	)
	)
v.	)
	)
Crestmark Bank; Crestmark Financial Corporation.	)
Appellees.	)

BEFORE: EDMUNDS, Nancy G., U.S. District Judge

ORDER REVERSING THE OPINION AND ORDER OF THE BANKRUPTCY COURT

Plaintiffs in this adversary action, Crestmark Banks and Crestmark Financial Corp. (collectively, "Crestmark"), appeal a Bankruptcy Court order denying their motion for summary judgment and granting summary judgment *sua sponte* to the Internal Revenue Service. The Bankruptcy Court ruled that federal tax liens had priority over Crestmark's, even though the federal liens did not identify the debtor by its name as registered with the State of Michigan. For the reasons fully explained below, the Court REVERSES the Bankruptcy Court's order.

I. Background

In April of 1998, the debtor, Spearing Tool and Manufacturing Co., and Crestmark Bank entered into a lending agreement. The debtor granted Crestmark Bank a security interest in all of its assets, including accounts receivables. Crestmark Bank perfected its security interest by filing a UCC financing statement.

In April of 2001, Crestmark Financial Corp. ("CFC") entered into a secured financing arrangement with the debtor, whereby CFC agreed to purchase accounts receivables from the debtor. The debtor granted CFC a security agreement in all of its assets, including accounts receivables. On April 21, 2001, CFC perfected its security interest by filing a UCC financing statement.

On October 15, 2001, the IRS filed two notices of federal tax lien with the Michigan Secretary of State for a total amount of $ 202,770.11. This appeal centers on the name of the debtor the IRS used on its tax liens. The IRS filed the

liens under the name "Spearing Tool & MFG Company, Inc." The debtor's exact registered name, however, is "Spearing Tool and Manufacturing Co."

CFC submitted periodic lien search requests for the debtor to the State of Michigan, using the debtors exact registered name. The results did not disclose the IRS liens. Relying on the absence of liens in the search results, CFC made funding advances to the debtor between October 15, 2001, and April 6, 2002.

On April 16, 2002, the debtor filed for bankruptcy relief under chapter 11. On April 18, 2002, the Bankruptcy Court entered a Consent Order Approving Factoring of Accounts Receivable Under Factoring Agreement, Use of Cash Collateral, and Granting Adequate Protection. The order provided for a $ 200,000 reserve account to be managed by Crestmark and funded by pre-petition accounts receivable collections. The amount currently in the reserve account, approximately $ 153,058.33, is the amount now in controversy. The Bankruptcy Court's order reserved for future determination the respective rights of Crestmark and the IRS in the account balance.

II. Standard of Review

This Court has jurisdiction to hear appeals from final judgments, orders and decrees issued by bankruptcy judges in cases and proceedings under the Bankruptcy Code. *See* 28 U.S.C. § 158(a)(1). Findings of fact are reviewed under the clearly erroneous standard. *See* Fed. R. Bankr. P. 8013; Fed. R. Civ. P. 52. Conclusions of law are reviewed *de novo*. *See In re Caldwell,* 851 F.2d 852, 857 (6th Cir. 1988); *Corzin v. Fordu (In re Fordu),* 209 B.R. 854, 857 (B.A.P. 6th Cir. 1997).

III. Analysis

The issue on summary judgment was whether the IRS's liens had priority over CFC's because under state law, liens must be filed under the debtor's actual registered name. The Bankruptcy Court decided that the IRS's liens were valid according to federal law, and that they have priority over CFC's liens granted after the IRS filed its liens.

Federal law controls the priority of tax liens versus Crestmark's interest. *See Aquilino v. United States,* 363 U.S. 509, 513-14, 80 S. Ct. 1277, 1960-2 C.B. 477, 4 L. Ed. 2d 1365,(1960); *United States v. Bank of Celina,* 721 F.2d 163, 166 (6th Cir. 1983).

A. Federal Liens' Compliance with State Requirements

Crestmark argues that the IRS liens do not have priority because they do not comply with Michigan state law governing the name of the debtor on a financing statement. Michigan statutes provide:

§ 440.9503. Name of debtor and secured party

> Sec. 6503. (1) A financing statement sufficiently provides the name of the debtor if it meets all of the following that apply to the debtor:
>
> > (a) If the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized.

§ 440.9506. Effect of errors or omissions

> Sec. 9506. (1) A financing statement substantially satisfying the requirements of this part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement obviously misleading.
>
> (2) Except as otherwise provided in subsection (3), a financing statement that fails sufficiently to provide the name of the debtor in accordance with section 9503(1) is seriously misleading.
>
> (3) If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with section 9503(1), the name provided does not make the financing statement seriously misleading.

Mich. Comp. Laws Ann. §§ 440.9503, 440.9506 (West 2003 Supp.).

The Bankruptcy Court rejected Crestmark's position that because the IRS liens did not comply with Michigan law, the liens should not be granted priority. The court relied on the Supreme Court's holding in *United States v. Union Cent. Life Ins. Co.*, 368 U.S. 291, 294, 82 S. Ct. 349, 1962-1 C.B. 328, 7 L. Ed. 2d 294 (1961):

> While § 3672(a)(1) [the precursor to § 6323] unquestionably requires notice of a federal lien to be filed in a state office when the State authoritatively designates an office for that purpose, the section does

> not purport to permit the State to prescribe the form or contents of that notice. Since such an authorization might well result in radically differing forms of federal tax notices for the various States, it would run counter to the principle of uniformity which has long been the accepted practice in the field of federal taxation.

Crestmark argues that *Union Central* is not dispositive of the issue in this case because *Union Central* concerned the design of the form itself (specifically, if certain information needed to be included on the IRS form), but here, the design of the form is not at issue; rather, the manner in which the IRS completed the form is the issue. Not only was the necessity of including specific property descriptions the issue in *Union Central,* but the conflict among two circuit court cases that *Union Central* sought to resolve also decided whether IRS liens were required by state law to recite specific property descriptions when federal law imposed no such requirement. *See Youngblood v. United States,* 141 F.2d 912 (6th Cir. 1944); *United States v. Rasmuson,* 253 F.2d 944 (8th Cir. 1958).Crestmark contends that this distinction is important because *Union Central* focused on the impracticality and lack of consistency if the IRS was required to comply with each states' different requirements for liens, but in this case that is simply not an issue: filling out a form correctly does not implicate the same concerns as creating a different form for different states.

Crestmark reads *Union Central's* holding too narrowly. *Union Central* expressly prevents states from prescribing the content of IRS liens, not just the form. 368 U.S. at 294. Moreover, while some of the reasoning in support of the holding does not seem applicable to this case, other parts of the Court's reasoning support the decision to apply *Union*

Central to this case. The Court cited the tax code, amended in 1954, which stated that IRS liens were valid if filed on the IRS form "notwithstanding any law of the State or Territory regarding the form or content of a notice of lien." The Court used this amendment to support the conclusion that Congress did not intend for state laws to control the form or content of IRS lien forms. The current tax code provides: "The form and content of the notice referred to in subsection (a) shall be prescribed by the Secretary. Such notice shall be valid notwithstanding any other provision of law regarding the form or content of a notice or lien." 26 U.S.C. § 6323(f)(3). The current statute is even broader than the one relied on by *Union Central,* but its message is the same: state law will not invalidate an IRS lien because of its form.

The issue thus becomes whether the lien in this case complied with federal law. The government concedes that the most applicable test is that of reasonableness. In cases where the government has made errors in the debtor's name on the lien, courts inquire whether a reasonable search of the index would have disclosed the error-laden federal tax lien. If such a search would have disclosed the existence of the lien then the notice of federal lien meets the statutory requirements of 26 U.S.C. § 6323. The Bankruptcy Court disagreed, finding that cases involving errors in the legal name of the debtor were not controlling because here, there was no error - the IRS used a version of the debtor's name, just not the version registered with the State of Michigan. This Court concludes that the distinction between a typographical error and an error in choosing the version of the name is meaningless. The source of the error (sloppiness vs. good faith belief that the recited name was correct) is not relevant to whether a subsequent searcher would discover the lien.

Several courts have applied the reasonableness test. For example, in *Richter's Loan Co. v. United States,* 235 F.2d 753 (5th Cir. 1956), the notice of tax lien was filed under the taxpayers' name of "Freidlander," when the taxpayers' actual name was "Friedlander." An incorrect address was also listed below the taxpayers' names. The Fifth Circuit rejected the argument that the misspelled name was insufficient to put persons on notice that Joseph Freidlander had a lien against him by concluding that a slight misspelling could not mislead searchers of the tax liens that there was a notice of lien against the taxpayer. *Id.* at 755.

In *United States v. Sirico,* 247 F. Supp. 421 (S.D.N.Y. 1965), a mortgagee claimed its lien was superior to federal tax lien filed three years earlier because the tax lien only referred to the taxpayer by her first initial, "A. Sirico," instead of her full name, "Assunta Sirico." The court concluded:

> The mere fact that a full name is not given or that there is an addition, omission or substitution of letters in a name, or even errors, does not, in and of itself, invalidate the notice. The essential purpose of the filing of the lien is to give constructive notice of its existence. The test is not absolute perfection in compliance with the statutory requirement for filing the tax lien, but whether there is substantial compliance sufficient to give constructive notice and to alert one of the government's claim.

Id. at 422.

Courts applying the reasonableness test necessarily consider the recording method employed by the state or county. In *Hudgins v. I.R.S.*, 967 F.2d 973 (4th Cir. 1992), the government filed a tax lien under the name "Hudgins

Masonry, Inc.," even though the taxpayer, Michael Steven Hudgins, had failed to pay his corporate charter fees and the Commonwealth of Virginia had terminated his corporate charter. Hudgins continued to file federal tax returns under the corporate name. *Id.* at 975. The issue before the court was whether the federal tax lien filed under the corporate name was sufficient to give notice of the lien to a buyer of the taxpayer's personal property. *Id.* The court first decided that in the bankruptcy context, courts should look to whether the government's notice of tax lien provided constructive notice to the bona fide purchaser, and refused to adopt a bright-line test, adopted by only a few other courts, which requires that tax liens provide the taxpayer's name correctly or it is not granted priority. *Id.* at 976.

The court went on to agree with the district court's conclusion that the tax lien filed under the corporate name did provide constructive notice to buyers of the taxpayer's business-related assets because the county recording system listed liens against individuals and corporations in the same index, and all of the listings under "Hudgins" were on the same page. *Id.* at 977. As for the taxpayer's personal assets, the court reasoned that even if a searcher noticed the lien for his corporation, that purchaser would have reasonably assumed that the lien did not extend to personal assets because personal assets are generally shielded from corporate liability. *Id.* Thus, the Fourth Circuit focused on the particular filing system employed by the county and the method a searcher used when searching those records to determine whether a searcher should have had constructive notice of the mistakenly filed tax lien. *See also Whiting-Turner/A.L. Johnson v. P.D.H. Development, Inc.*, 184 F. Supp.2d 1368 (M.D. Ga. 2000) (concluding that a tax lien for "PD HILL DEVELOPMENT INC," which incorrectly identified the taxpayer "PDH DEVELOPMENT INC," would have put a

reasonable searcher on notice of the lien because the page from the county index lien showed that the erroneous federal lien appeared directly above a correctly filed lien under the taxpayer's correct name, and because the index was organized alphabetically, the two names are so similar, and the close proximity of the two names on the index page, a reasonable searcher would have noticed the federal tax lien and investigated further).

Turning to the present case, the government contends that the tax lien provided constructive notice to Crestmark because Crestmark knew that the debtor sometimes used the name as recited on the federal tax lien, knew that the debtor was liable for unpaid taxes, and also had copies of the debtor's tax returns wherein the debtor used the version of its name recited on the federal tax lien. (Adversary Proceeding Docket Item No. 21, Cole Decl. Ex.'s 3 and 4.)

Crestmark responds that because of the state lien recording system's search logic, and the revised UCC which requires strict compliance regarding the correct naming of debtors, it would not have been reasonable for the banks to search under variations of the debtor's name nor would any reasonable search have produced evidence of the tax lien. If the Court agrees with the government, the burden will be on future searchers to conduct separate searches under every version of a potential debtor's name of which it is aware or should be aware. While the new version of the UCC, i.e. state law, does not control the content of federal tax liens, it does shed light on what is reasonable behavior for searchers in today's environment. Crestmark points out that the a search of the Michigan Secretary of State's record for liens on personal property only disclose records that match exactly with the name designated in the request. The Secretary of State will not search variants of the name (as it did under the

former version of Article 9 of the UCC), and the public has no independent access to search the index.[1] It is not reasonable for searchers to conduct one search for liens that might include federal tax liens, and require them to conduct separate, multiple searches under the debtor's multiple possible names for a possible federal tax lien. The burden on the government to include corporate taxpayers' registered names seems slight by comparison.

The government responds that a ruling in its favor will not add a burden to lenders because most secured lenders require copies of borrower's tax returns and also require the borrower to execute documents allowing the creditor to contact the IRS to review the borrower's filing and payment history. While this may be true (no evidence was presented to support this statement), it seems only true at the point of the initial loan application. In this case, the problem arose when the IRS placed its lien on the debtor's property after the initial loans were made, but prior to subsequent loans and prior to Crestmark's routine checks of its borrower's records at the Secretary of State. While it might be usual practice for lenders to contact the IRS when initially making a loan, not even the government contends that lenders routinely contact the IRS to update their records before extending additional credit to current borrowers. Indeed, that would seem to defeat the purpose of the current system, which requires the IRS to file notice of liens in the same state office as other lien holders, allowing lenders to check one central location for IRS liens as well as other secured creditors.

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[1] The system is different for liens on real property, which are maintained in a separate filing system, and is accessible to the public to search the records directly.

The issue is essentially who should bear the burden of recording systems which use rigid computerized search logic. Gone are the days of large alphabetical books, where a reasonable searcher would likely find a misspelled (or mistakenly abbreviated) name because it would appear in close proximity to where a lien with a correctly spelled name would have appeared. Fairness to third parties dictates that in cases like this, where a reasonable searcher would not have notice of the federal tax lien, the IRS's liens should not have priority over other lenders.

IV. Conclusion

Being fully advised in the premises, having read the pleadings, and for the reasons set forth above, the Court hereby orders as follows:

The Bankruptcy Court's Order granting the IRS summary judgment is REVERSED. This adversary case is remanded to the Bankruptcy Court for proceedings consistent with this opinion.

/s/
Nancy G. Edmunds
U. S. District Judge

Dated: NOV 05 2003

JUDGMENT

The Court having reviewed and fully considered the pleadings filed by the parties and for the reasons set forth in an Order dated NOV 05 2003 and filed herein;

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs' sappeal is GRANTED and the May 14, 2003 Order of the Bankruptcy Court is REVERSED.

SO ORDERED.

/s/
Nancy G. Edmunds
U.S. District Judge

Dated: Nov 05 2003

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

U.S. District Court Case No. 03-72070

[Filed May 14, 2003]

In re: Spearing Tool and Manufacturing Co., Inc.	)
Debtor.	)
	)
United States of America,	)
Appellant,	)
	)
v.	)
	)
Crestmark Bank; Crestmark Financial Corporation.	)
Appellees.	)

BEFORE: RHODES, Steven W.

OPINION REGARDING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The plaintiffs, Crestmark Bank and Crestmark Financial Corp., filed a motion for summary judgment to determine lien priority. The defendant, the Internal Revenue Service, filed an objection. Following a hearing on March 31, 2003, the Court took the matter under advisement. The Court now concludes that there are no genuine issues of material fact and that as a matter of law, the plaintiffs' motion for summary judgment should be denied and that the IRS is entitled to summary judgment.

I.

In April of 1998, the debtor and Crestmark Bank entered into a lending agreement and the debtor granted Crestmark a security interest in all of its assets, including accounts receivables. Crestmark perfected its security interest by filing a UCC financing statement. (Pls.' Ex. 3.)

On April 6, 2001, Crestmark Financial Corp. ("CFC") entered into a secured factoring arrangement with the debtor under which CFC agreed to purchase accounts receivables from the debtor. The debtor granted CFC a security agreement in all of its assets, including accounts receivables. On April 21, 2001, CFC perfected its security interest by filing a UCC financing statement. (Pls.' Ex. 4.) As of the petition date, the debtor owed CFC $ 278,505.85.

On October 15, 2001, the IRS filed two notices of federal tax lien with the Michigan Secretary of State in the total amount of $ 202,770.11. (Pls.' Ex. 5.) The tax liens were filed under the name "Spearing Tool & MFG Company, Inc."

However, the debtor's exact registered name is "Spearing Tool and Manufacturing Co." (See Pls.' Ex. 2.)

As part of its due diligence, CFC submitted periodic lien search requests for the debtor to the State of Michigan, using the debtor's exact registered name. The results indicated no liens for the period which included October 15, 2001. (Pls.' Ex. 7.) Relying on the absence of liens in the search results, CFC made funding advances to the debtor between October 15, 2001, and April 6, 2002, the repayment of which was secured by the debtor's assets.

On April 16, 2002, the debtor filed for chapter 11 relief. On April 18, 2002, the Court entered a Consent Order Approving Factoring of Accounts Receivable Under Factoring Agreement, Use of Cash Collateral, and Granting Adequate Protection. This order provided for a $ 200,000 reserve account to be managed by Crestmark and funded by pre-petition accounts receivable collections. The amount in the reserve account is currently $ 153,058.33, which is the amount in controversy. The order reserved for future determination the respective rights of Crestmark and the IRS in the account balance. On September 20, 2002, Crestmark filed this complaint to determine lien priority.

II.

Crestmark contends that the IRS's liens were not properly filed with the State of Michigan and are therefore invalid. Crestmark contends that under Michigan law a financing statement must show the exact registered name of the debtor or else it is statutorily defective.

The IRS asserts that although state law controls the place for filing a federal tax lien, federal law controls the form and

content of the filing. The IRS contends that because the lien satisfied the requirements of federal law, the lien is valid. The IRS also contends that Crestmark should have conducted a search under the various derivations of the debtor's name used by the debtor, and that such a search would have revealed the IRS's lien.

III.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56. A trial court should only grant summary judgment to the nonmoving party with great caution. *K.E. Res., Ltd. v. BMO Fin. Inc. (In re Century Offshore Mgmt Corp.),* 119 F.3d 409, 412 (6th Cir. 1997). However, the fact that the nonmoving party has not filed its own summary judgment motion does not preclude the entry of summary judgment if otherwise appropriate. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 326, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986); *Ledford v. Tiedge (In re Sams),* 106 B.R. 485, 491 (Bankr. S.D. Ohio 1989) ("Federal Courts have long recognized that if there is no genuine issue as to any material fact the court may enter summary judgment, sua sponte."); *Dickeson v. Quarberg*, 844 F.2d 1435, 1444 n.8 (10th Cir. 1988) (A court may grant summary judgment to a nonmoving party "'if the facts were fully developed at the summary judgment hearing so that the court ... can determine that the nonmoving party clearly was entitled to a judgment as a matter of law ... [and] there is no procedural prejudice to the moving party.'") (quoting 10A Wright, Miller & Kane, Federal Practice & Procedure § 2720, at 28-9 (1983)).

IV.

26 U.S.C. § 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6323(a) provides:

> The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

26 U.S.C. § 6323(f) provides, in relevant part, that the notice referred to in subsection (a) shall be filed--

> (ii) Personal property.--In the case of personal property, whether tangible or intangible, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated, except that State law merely conforming to or reenacting Federal law establishing a national filing system does not constitute a second office for filing as designated by the laws of such State[.]

26 U.S.C. § 6323(f)(1)(A)(ii).

The statute further provides:

> (3) Form.--The form and content of the notice referred to in subsection
>
> (a) shall be prescribed by the Secretary. Such notice shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien.

26 U.S.C. § 6323(f)(3).

The regulations on Procedure and Administration provide that the notice shall be filed on Form 668, entitled "Notice of Federal Tax Lien Under Internal Revenue Laws." Treas. Reg. § 301.6323(f)-1(d)(1). Further, a Notice of Federal Tax Lien "must identify the taxpayer, the tax liability giving rise to the lien, and the date the assessment arose." Treas. Reg. § 301.6323(f)-1(d)(2). These regulations have the force and effect of law. *United States v. Correll,* 389 U.S. 299, 306, 88 S. Ct. 445, 449, 19 L. Ed. 2d 537 (1967).

In determining the priority of the tax liens as against Crestmark's interest, federal law applies. *See Aquilino v. United States,* 363 U.S. 509, 513-14, 80 S. Ct. 1277, 1280-81, 1960-2 C.B. 477, 4 L. Ed. 2d 1365,(1960); *United States v. Bank of Celina,* 721 F.2d 163, 166 (6th Cir. 1983).

Crestmark asserts that the liens are not valid because they did not comply with the following provisions of state law:

> M.C.L.A. § 440.9503. Name of debtor and secured party Sec. 9503. (1) A financing statement sufficiently provides the name of the debtor if it meets all of the following that apply to the debtor:

> (a) If the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized.

M.C.L.A. § 440.9503(1)(a).

M.C.L.A. § 440.9506. Effect of errors or omissions

> Sec. 9506. (1) A financing statement substantially satisfying the requirements of this part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.
>
> (2) Except as otherwise provided in subsection
>
> (3), a financing statement that fails sufficiently to provide the name of the debtor in accordance with section 9503(1) is seriously misleading.
>
> (3) If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with section 9503(1), the name provided does not make the financing statement seriously misleading.

M.C.L.A. § 440.9506(1).

Thus, it is Crestmark's position that because the IRS did not use the debtor's registered name on the financing

statements and a search of the records under the standard search logic did not reveal the IRS's liens, the financing statements are not valid.

The Court concludes that Crestmark's argument must be rejected. In *United States v. Union Cent. Life Ins. Co.*, 368 U.S. 291, 82 S. Ct. 349, 1962-1 C.B. 328, 7 L. Ed. 2d 294(1961), the Supreme Court held:

> While § 3672(a)(1) [the precursor to § 6323] unquestionably requires notice of a federal lien to be filed in a state office when the State authoritatively designates an office for that purpose, the section does not purport to permit the State to prescribe the form or the contents of that notice. Since such an authorization might well result in radically differing forms of federal tax notices for the various States, it would run counter to the principle of uniformity which has long been the accepted practice in the field of federal taxation.

Id. at 294, 82 S. Ct. at 351. *See also United States v. Herman,* 310 F.2d 846, 848 (2d Cir. 1962) ("The state is permitted to designate the place of filing . . . but the state may not add further requirements for validity."); *Bertelt v. United States (In re Bertelt),* 206 B.R. 579, 583 (Bankr. M.D. Fla. 1996) ("Federal law governing the form of a notice of federal tax lien supersedes any other law, including state law, relating to the content of such a notice.").

As noted above, federal law requires that the notice of tax lien "identify the taxpayer." Treas. Reg. § 301.6323(f)-1(d)(2). The Court must conclude that the notices filed by the IRS do identify the taxpayer. This case is distinguishable from cases in which the IRS made an *error* in identifying the

taxpayer and the courts were left to determine whether the IRS *sufficiently* identified the taxpayer such that a reasonable search would reveal the existence of the lien. *See e.g., Hudgins v. IRS (In re Hudgins),* 967 F.2d 973 (4th Cir. 1992) (Lien filed against "Hudgins Masonry, Inc." did not sufficiently identify the taxpayer, Michael Hudgins.); *Richter's Loan Co. v. United States,* 235 F.2d 753 (5th Cir. 1956) ("Friedlander" misspelled "Freidlander" did sufficiently identify the taxpayer.); Whiting-Turner/A.L. Johnson v. P.D.H. Dev., Inc., 184 F. Supp. 2d 1368 (M.D. Ga. 2000) (Federal tax lien in the name of "PD HILL DEVELOPMENT INC" sufficiently identified the taxpayer "PDH DEVELOPMENT INC"; the names were substantially identical and a reasonable search would have revealed the existence of the lien.); *Brightwell v. United States,* 805 F. Supp. 1464 (S.D. Ind. 1992) (Notice of federal tax lien substantially complied with requirements for constructive notice, even though it listed incorrect middle initial for taxpayer and inserted extra space in his last name.); *Haye v. United States,* 461 F. Supp. 1168 (C.D. Cal. 1978) (Castillo misspelled Castello, resulting in lien being recorded nine pages from the appropriate place, would not give notice to a reasonable and diligent searcher and thus did not sufficiently identify the taxpayer.); *Reid v. IRS (In re Reid),* 182 B.R. 443 (Bankr. E.D. Va. 1995) (Lien filed under the name Gary A. Reid, when debtor's name was actually Cary A. Reid, was invalid because a reasonable and diligent search would not reveal the notice.).

Here, there was no error in identifying the taxpayer. The IRS used the accepted abbreviation for the word "Manufacturing." *See* Webster's New Collegiate Dictionary 512 (1986); THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 303 tbl. T.6 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000). Further, the debtor frequently used the

"Mfg." and "MFG." abbreviations in identifying itself. (See Ex. 4 to Decl. of Thomas P. Cole.) Moreover, Crestmark itself referred to the debtor as "Spearing Tool and Mfg." in credit narratives prepared by a Crestmark employee. (See. Ex. 3 to Cole Decl.) Accordingly, the Court concludes that the IRS identified the taxpayer as required by Treas. Reg. § 301.6323(f)-1(d)(2) and therefore its lien is valid and has priority over that of Crestmark.

The plaintiffs' motion for summary judgment is therefore denied and summary judgment is granted in favor of the IRS. The Court will enter an appropriate order

/s/
Steven W. Rhodes
Chief U.S. Bankruptcy Judge

Entered: May 14, 2003

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT TO DEFENDANT

For the reasons set forth in the Court's opinion entered this date, the plaintiffs' motion for summary judgment is denied. Summary judgment is granted in favor of the defendant. The Lien of the United States, Department of Treasury, Internal Revenue Service in the property of the debtor is valid and prior to the lien of the plaintiffs.

IT IS SO ORDERED.

/s/
Steven W. Rhodes
Chief U.S. Bankruptcy Judge

Entered May 14, 2003

Supreme Court, U.S.
FILED
JUL 5 - 2006
OFFICE OF THE CLERK

No. 05-1271

In the Supreme Court of the United States

CRESTMARK BANK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

EILEEN J. O'CONNOR
Assistant Attorney General

TERESA E. MCLAUGHLIN
MICHAEL J. HAUNGS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a notice of federal tax lien filed by the Internal Revenue Service adequately identified the taxpayer.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-10a) is reported at 412 F.3d 653. The opinion of the district court (Pet. App. 11a-23a) is reported at 302 B.R. 351, and the opinion of the bankruptcy court (Pet. App. 24a-33a) is reported at 292 B.R. 579.[1]

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2005. A petition for rehearing was denied on December 30, 2005 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on March 30, 2006. The

[1] The caption of the bankruptcy court's opinion as set forth in the appendix to the petition erroneously denominates the opinion as an opinion of the district court. Pet. App. 24a.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In April 1998 and April 2001, Spearing Tool and Manufacturing Co. (Spearing) entered into loan agreements with petitioners Crestmark Bank and Crestmark Financial Corp. Petitioners perfected their security interests in Spearing's property by filing financing statements with the Michigan Secretary of State. Pet. App. 4a-5a.

On October 15, 2001, after Spearing had failed to make certain federal employment tax payments, the Internal Revenue Service (IRS) filed notices of federal tax lien against Spearing with the Michigan Secretary of State. The notices identified the taxpayer as "SPEARING TOOL & MFG COMPANY INC," the name Spearing had used on its quarterly federal tax return for the third quarter of 2001, as well as on its return for the fourth quarter of 1994, the first quarter for which it was delinquent. Pet. App. 5a, 25a.

Petitioners periodically submitted lien search requests to the State of Michigan using the exact name under which Spearing was registered with the Michigan Secretary of State, "Spearing Tool and Manufacturing Co." Pet. App. 5a. That name differed from the name used in the IRS notices of federal tax lien in that the notices used "&" instead of "and" and abbreviated "Manufacturing" to "MFG." Because Michigan's electronic search technology retrieves only liens for debtors whose name matches the precise characters searched (other than "noise words" such as "Co." and "Inc.," which the search technology ignores), the searches submitted by petitioners failed to reveal the

federal tax liens. A search result in February 2002, however, included a hand-written note stating, "[y]ou may wish to search Spearing Tool & Mfg. Company Inc." Petitioners nonetheless failed at that time to submit a search using the suggested name, and they made additional advances of funds to Spearing between October 15, 2001, and April 6, 2002. *Id.* at 5a-6a & n.2.

2. On April 16, 2002, Spearing filed a petition in bankruptcy under Chapter 11. After the bankruptcy filing, petitioners for the first time requested a search under the name "Spearing Tool & Mfg. Company Inc.," and the ensuing search revealed the existence of the notices of federal tax lien. Pet. App. 6a.

Petitioners then brought this suit in the bankruptcy court to determine their lien priority against the United States. Pet. App. 6a. Petitioners moved for summary judgment, contending that their security interests in Spearing's personal property took priority over the federal tax liens. *Id.* at 25a. Petitioners argued that the notices of federal tax lien were invalid because they failed to adhere to Michigan law in using a name other than Spearing's exact registered name. *Id.* at 26a, 30a-31a. The government opposed petitioners' motion, contending that federal law was controlling, and that the lien notices validly identified Spearing because they used common abbreviations and the name shown on recent tax returns. *Id.* at 20a, 27a.

The bankruptcy court denied petitioners' motion for summary judgment and granted summary judgment to the government *sua sponte*. Pet. App. 24a-33a. The court observed that, although state law controls the place a federal tax lien is to be filed, federal law controls the form and content of the notice. *Id.* at 31a. The court noted that Treasury Regulations require a notice of

federal tax lien to "identify the taxpayer," *ibid.* (citing 26 C.F.R. 301.6323(f)-1(d)(2)), and that here, the notices did "identify the taxpayer," *ibid.* The court explained that "[t]he IRS used the accepted abbreviation for the word 'Manufacturing';" that Spearing "frequently used the 'Mfg.' and 'MFG.' abbreviations in identifying itself"; and that the bank "itself referred to the debtor as 'Spearing Tool and Mfg.' in credit narratives prepared by a Crestmark employee." *Id.* at 32a-33a.

3. The district court reversed and granted summary judgment to petitioners, concluding that their security interests took priority over the federal tax lien. Pet. App. 11a-23a. In the district court's view, it would be unreasonable to require a lender "to conduct separate, multiple searches under the debtor's multiple possible names for a possible federal tax lien," and "[t]he burden on the government to include corporate taxpayers' [exact] registered names seems slight by comparison." *Id.* at 21a.

4. The court of appeals reversed the district court and affirmed the bankruptcy court's grant of summary judgment for the government. Pet. App. 3a-10a. The court noted that the form and content of a notice of federal tax lien is a matter of federal law, and that a notice validly identifies the taxpayer if a "reasonable and diligent search" would reveal the existence of the lien. *Id.* at 7a. The court concluded that petitioners should have submitted searches of Spearing's name using "Mfg." and "&," which are "most common abbreviations" that petitioners "had notice that Spearing sometimes used." *Id.* at 8a. The court observed that policy considerations also supported its conclusion because "[a] requirement that tax liens identify a taxpayer with absolute precision would be

unduly burdensome to the government's tax-collection efforts." *Id.* at 9a. The court made clear that it intended to "express no opinion about whether creditors have a general obligation to search name variations," and that its "holding [was] limited to these facts." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. It is fundamental that federal law controls the form and content of a notice of federal tax lien. *United States* v. *Union Cent. Life Ins. Co.*, 368 U.S. 291, 296 (1961). Under 26 U.S.C. 6323(f)(3), "[t]he form and content of the notice" of lien "shall be prescribed by the Secretary," and "shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien." To be valid, a notice of lien must "identify the taxpayer." 26 C.F.R. 301.6323(f)-1(d)(2). It is well-settled that a notice "need not perfectly identify the taxpayer." Pet. App. 7a. Rather, a notice is valid if a "reasonable and diligent search" would reveal the tax lien's existence, even if the notice contains some manner of error in identifying the taxpayer. *Tony Thornton Auction Serv., Inc.* v. *United States*, 791 F.2d 635, 639 (8th Cir. 1986); see *Kivel* v. *United States*, 878 F.2d 301, 303, 305 (9th Cir. 1989).

The court of appeals correctly held that the notices of tax lien at issue in this case were valid under those standards, and the court's fact-bound conclusion warrants no further review. The notices used the name submitted by Spearing itself on certain of its employment tax returns. Although that name varied

slightly from the company's exact name in the Michigan registry by using an ampersand in place of "and" and by abbreviating "Manufacturing" as "MFG," those abbreviations are "most common," and petitioners "had notice that Spearing sometimes used these abbreviations." Pet. App. 8a. Petitioners were in possession of documents that identified Spearing using variations of the exact registered name, including use of "&" instead of "and" and "Mfg." instead of "Manufacturing," and petitioners themselves referred to Spearing as "Spearing Tool and Mfg." in credit narratives. Gov't C.A. Br. 6; Pet. App. 8a, 33a. And a hand-written note on one search result specifically recommended that petitioners submit an alternative search using the precise name that appeared on the notices of federal tax lien. *Id.* at 5a. In those circumstances, the court of appeals correctly held that a reasonable and diligent search would have revealed the existence of the tax liens.[2]

There is no merit to petitioner's contention (Pet. 23-26) that the IRS's notices, to be valid, were required to comply with revised Article 9 of the U.C.C. Under revised Article 9, an error or omission in listing the name of a debtor renders a financial statement (including a notice of lien) invalid if a search of the records under the debtor's "correct name," using the "standard search logic" of the filing office, would fail to retrieve the notice. See Mich. Comp. Laws Ann. § 440.9506(3) (West 2003).

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[2] As the government explained in the court of appeals, Gov't C.A. Br. 51, a search, using the terms "Spearing Tool," of the databases of tax liens and financing statements contained in the commonly-used Lexis and Westlaw legal research services would have disclosed the notices of federal tax lien at issue.

The validity of a notice of federal tax lien is a matter of federal law, not state law such as the U.C.C. provisions adopted by Michigan. See *Union Cent. Life Ins. Co.*, 368 U.S. at 296; Pet. App. 6a-7a. Although the federal rule could incorporate state law, the court of appeals correctly concluded that the interests in uniformity and in avoiding interfering with the collection of federal tax obligations compel adhering to the established reasonable-and-diligent-search rule rather than adopting the standards set forth in revised U.C.C. Article 9. Pet. App. 9a-10a. Cf. *Union Cent.*, 368 U.S. at 294 (noting the "principle of uniformity which has long been the accepted practice in the field of federal taxation"). While all states have elected to adopt revised Article 9, the validity of a notice under Article 9 ultimately depends on a particular State filing office's standard computer search logic. See Mich. Comp. Laws Ann. § 440.9506(3) (West 2003). And the States' computer search logic criteria, to the extent they have been developed and are identifiable, can vary in material respects. Gov't C.A. Br. 43-44.

Additionally, the IRS, as an involuntary creditor, stands in a substantially different position from voluntary private lenders like petitioners. Article 9 of the U.C.C. applies only to consensual liens, not statutory liens such as federal tax liens. See Mich. Comp. Laws Ann. § 440.9109(1)(a) (West 2003); Pet. App. 9a. Voluntary lenders have the ability and incentive to demand financial information and disclosures from borrowers as part of the process of extending credit. Petitioners thus were aware that Spearing was behind in its federal tax payments, had directed their employees to keep a close watch on the situation, and should have expected that a tax lien would be filed.

Gov't C.A. Br. 5-6. In that context, it is fully reasonable to expect a lender who is attempting to identify the existence of competing liens (including tax liens that petitioners should have expected would be filed) to do more than rely on a single, exact-name search of the type conducted by petitioners.

The IRS, as an involuntary creditor, lacks any relationship with a debtor comparable to that of voluntary creditors such as petitioners, and thus lacks the sorts of information about the debtor that are ordinarily possessed by voluntary creditors. The IRS's lien preparation process is partially automated and reasonably uses the name submitted by the taxpayer itself, an efficient process that would be significantly compromised if the IRS were required to manually verify a taxpayer's exact name under the standards of revised Article 9. See Gov't C.A. Br. 40-42.[3]

Petitioners suggest (Pet. 15) that, under the court of appeals' decision, a lender is required "to search all names which might, only theoretically, be used by a debtor," and can "never be certain that it has searched the name used by the IRS to identify the taxpayer." The

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[3] Petitioners, relying on a Senate Committee Report, S. Rep. No. 1708, 89th Cong., 2d Sess. (1966), suggest that Congress intended to incorporate the U.C.C. rules concerning notices of federal tax lien. Pet. 21-22. The Committee Report, however, suggests only that Congress may have wished to adopt certain aspects of the U.C.C. in the law governing tax liens, and does not speak specifically to the question in this case concerning the standards for identifying the taxpayer. In any event, the Committee Report was issued in 1966, when the U.C.C. standard governing the adequacy of notice was one of "substantial compliance" rather than strict compliance, and resembled the standard applied here by the court of appeals. See Gov't C.A. Br. 34-35. The new standards in revised Article 9 were not promulgated until 1998. *Id.* at 34.

court of appeals, however, explicitly stated that it was "express[ing] no opinion about whether creditors have a general obligation to search name variations," and that its "holding [was] limited to these facts." Pet. App. 9a. That fact-specific holding warrants no further review.

2. There is no merit to petitioners' contention (Pet. 16-18, 21-22) that the court of appeals' decision conflicts with this Court's decision in *United States* v. *Kimbell Foods*, 440 U.S. 715 (1979). In that case, the Court held that the priority of federal liens arising from certain federal lending programs was a matter of federal law, and the Court incorporated state U.C.C. provisions concerning priority of private and consensual liens as the governing federal standard. The rationale for adopting state law as the federal rule of decision in *Kimbell Foods* was that the affected federal agencies' consensual loans resembled loans made by commercial lenders. See *id.* at 733-738. The Court specifically distinguished the federal agency liens at issue in the case from federal tax liens. See *id.* at 734 (noting the "significant differences between federal tax liens and consensual liens"). The Court explained that, whereas the affected agencies were acting "voluntarily" as "a lender or guarantor," with "detailed knowledge of the borrower's financial status," in the tax context the "United States is an involuntary creditor of delinquent taxpayers, unable to control the factors that make tax collection likely." *Id.* at 736. *Kimbell Foods* therefore is of no assistance to petitioners.

There likewise is no merit to petitioners' contention (Pet. 19, 25) that the court of appeals' decision conflicts with *Wallin* v. *Commissioner*, 744 F.2d 674 (9th Cir. 1984), and *McPartlin* v. *Commissioner*, 653 F.2d 1185 (7th Cir. 1981). Neither case concerned or addressed a

notice of federal tax lien, or the standards for identifying the taxpayer on such a notice. Instead, both cases involved the IRS's failure properly to address a notice of deficiency to a taxpayer's last known address.[4]

3. There is no merit to petitioner's fact-bound contention (Pet. 26-29) that the bankruptcy court abused its discretion when it entered summary judgment against petitioners notwithstanding that the government had not moved for summary judgment. Petitioners filed a motion for summary judgment, and "there is a difference between simply granting summary judgment *sua sponte* and doing so in favor of an opposing party when one party has made a motion for summary judgment." *Employers Ins.* v. *Petroleum Specialities, Inc.*, 69 F.3d 98, 105 (6th Cir. 1995). Contrary to petitioner's argument, "the fact that the nonmoving party has not filed its own summary judgment motion does not preclude the entry of summary judgment if otherwise appropriate." *In re Century Offshore Mgmt. Corp.*, 119 F.3d 409, 412 (6th Cir. 1997). Where, as here, "the parties fully briefed the determinative issue," and the moving party "concede[d] that there [were] no facts at issue," *ibid.*, it was no abuse of discretion for the

[4] Petitioners similarly err in alleging a conflict (Pet. 25) with two district court decisions: *Kennedy* v. *United States*, 403 F. Supp. 619 (W.D. Mich. 1975), which likewise involved a failure to send a deficiency notice to the taxpayer's last known address, and *Davis* v. *United States*, 728 F. Supp. 513 (C.D. Ill. 1989), which required the IRS to refile a notice of lien under a taxpayer's new name when the revenue officer knew of the name change and the taxpayer had filed subsequent tax returns under the new name.

bankruptcy court to grant summary judgment against petitioners.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
EILEEN J. O'CONNOR
Assistant Attorney General
TERESA E. MCLAUGHLIN
MICHAEL J. HAUNGS
Attorneys

JULY 2006

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[5] Petitioners assert (Pet. 7-8) that the court of appeals incorrectly assumed that the Michigan Secretary of State was the author of the hand-written note on petitioner's search result suggesting that petitioners submit a search using the name that appeared on the notices of federal tax lien. See Pet. App. 8a. Even if, as petitioners now suggest, the note was written by one of petitioners' own "employee[s] or agent[s]," Pet. 8, that would only reinforce petitioners' own awareness that it would be prudent to conduct a broader search.

(3)

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IN THE

Supreme Court of the United States

CRESTMARK BANK and
CRESTMARK FINANCIAL CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* COMMERCIAL FINANCE ASSOCIATION IN SUPPORT OF PETITIONERS

RICHARD M. KOHN
BARBARA M. FLOM
GOLDBERG, KOHN, BELL, BLACK,
ROSENBLOOM & MORITZ, LTD.
55 East Monroe Street
Suite 3700
Chicago, Illinois 60603
(312) 201-4000

DANIEL WALLEN
Counsel of Record
JONATHAN N. HELFAT
LLOYD M. GREEN
OTTERBOURG, STEINDLER,
HOUSTON & ROSEN, P.C.
230 Park Avenue
New York, New York 10169
(212) 661-9100

Attorneys for Amicus Curiae

201012

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the Commercial Finance Association ("*Amicus*" or "CFA"), is the primary national trade association for financial institutions that provide asset-based financing and factoring services to commercial borrowers.[1] Petitioners Crestmark Bank and Crestmark Financial Corporation (collectively, "Crestmark") are among the CFA's approximately 240 members. Asset-based financing is generally secured by first priority liens and mortgages on various forms of collateral, including accounts receivable, inventory, equipment, real estate, and other tangible and intangible property owned by the borrowers. Financing by CFA members comprises a substantial portion of the United States credit market, exceeding $350 billion in outstanding loans. Because this financing is predicated upon first priority liens and mortgages, "secret liens" that may unexpectedly come ahead of the lender's liens and mortgages are of paramount concern to the CFA and its members. *Amicus* believes that the Sixth Circuit's decision, *In re Spearing Tool and Mfg. Co.*, 412 F.3d 653 (6th Cir. 2005), was incorrect, and that the *Writ of Certiorari* sought by the Petitioners should be granted.

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1. Pursuant to S. Ct. R. 37.6, the *Amicus* states that no counsel for a party to this action authored any portion of this brief *amicus curiae* and that no person or entity, other than the *Amicus*, made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of the Court pursuant to S. Ct. R. 37.2(a).

SUMMARY OF ARGUMENT

In its opinion in *Spearing Tool*, the Sixth Circuit incorrectly held that a Notice of Federal Tax Lien, prepared and filed by the Internal Revenue Service (IRS) against a Michigan corporation using an inaccurate variation of the corporation's registered name, took priority over a lender's previously filed security interest perfected by a Uniform Commercial Code (U.C.C.) financing statement using the corporation's exact registered name. Repeated official searches of the corporation's exact registered name conducted by the Michigan Secretary of State at the lender's request did not and, indeed, could not reveal the government's lien because of the government's use of an inaccurate name in its filing, and the well-defined manner in which modern computerized search logic operates. Nevertheless, the Sixth Circuit erroneously concluded that the government's filing satisfied the requirement of 26 U.S.C. § 6323 (2000) that a Notice of Federal Tax Lien "identify the taxpayer," and was, therefore, entitled to priority over the lender's U.C.C. filings as to the lender's subsequent advances.

In so holding, *Spearing Tool* undercuts the decision of this Court in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979). There, the Court expressly held that a primary purpose of the Federal Tax Lien Act of 1966 (FTLA), Pub.L.No. 89-719, 80 Stat. 1125 (codified as amended in scattered sections of 26 U.S.C., 28 U.S.C., and 40 U.S.C.), was to "modernize" the relationship between federal tax liens, on the one hand, and the interests of commercial creditors, on the other. *Kimbell Foods*, 440 U.S. at 738, 99 S. Ct. at 1463-64. The Court in *Kimbell Foods* emphasized that in "structuring financial transactions, businessmen depend on state commercial law

to provide the stability essential for reliable evaluation of the risks involved." 440 U.S. at 739, 99 S. Ct. at 1464. The Sixth Circuit decision unfairly places lenders, purchasers and others who routinely rely on the integrity of official, State-operated, computerized lien filing systems in jeopardy of losing priority to undiscoverable government liens. The *Spearing Tool* decision will unduly burden secured lenders and the courts by inviting the government to litigate whether an admittedly incorrect name of the borrower in tax lien filings is "close enough" to be given priority over the U.C.C. filings of secured lenders who have done everything the law requires to perfect their security interests. *Spearing Tool* unfairly subordinates to secret government liens the liens of commercial lenders who have otherwise assured themselves, through official searches of computerized U.C.C. and tax lien records conducted by State authorities, that no tax liens or other filings are entitled to priority over their positions.

By not simply requiring the government to use a corporation's easily ascertained registered name to "identify the taxpayer" in a federal tax lien notice, just as private parties are required to do in filing their U.C.C. financing statements, the Sixth Circuit decision increases credit costs borne by all borrowers and creates irremediable credit risk. After *Spearing Tool*, secured lenders face heightened risks that federal tax lien filings will not be revealed by official computerized searches conducted against the borrower's correct name. Secured lenders seeking to minimize these risks must now guess at, and search, countless name variations the government might choose to include in a tax lien filing. These additional searches have already caused, and will continue to cause, needlessly increased lien search costs that are typically borne by borrowers. Yet, despite those added searches and costs, the lender still cannot be sure of finding

secret government lien filings. In marginal cases, the additional risks posed by the Sixth Circuit decision will convince lenders not to extend credit, and will likely force some borrowers into bankruptcy that might have been able to obtain financing if not for the lender's justified fear of undiscoverable government liens.

Since Article 9 of the U.C.C. contains the only standard for "identifying the taxpayer" that comports with modern search and filing technology, this Court, consistent with its prior holding in *Kimbell Foods*, should grant the Petition. This Court should hold that, in the case of a government tax lien notice against a corporation, for the government's filing to be valid and entitled to priority over third parties who hold otherwise prior, perfected interests under State law, the tax lien notice must "identify the taxpayer" using the exact registered name of the corporation.

REASONS FOR GRANTING THE PETITION

I. *Spearing Tool* Undercuts the Holding of This Court in *Kimbell Foods*

If the Sixth Circuit decision stands, a U.C.C. financing statement filed by a private party to perfect its security interest must precisely spell out a corporate borrower's exact registered name, while an IRS tax lien notice against the same corporation may use mere approximations or variations of the corporation's name, even if such variations render the government's filing undiscoverable under the official filing and search systems operated by the States. Such a result would severely undercut the holding of this Court in *Kimbell Foods*. In *Kimbell Foods*, this Court held that the primary purposes of the FTLA were to lessen the government's ability

to rely on secret tax liens to defeat private secured creditors and, by modernizing the relationship between the FTLA and the U.C.C., to prevent the impairment of commercial credit:

> In enacting this legislation, Congress sought to "improv[e] the status of private secured creditors" and prevent impairment of commercial financing transactions by "moderniz[ing] . . . the relationship of Federal tax liens to the interests of other creditors." S.Rep.No. 1708, 89th Cong., 2d Sess., 1-2 (1966), U.S.Code Cong. & Admin.News 1966, p. 3722; see also H.R.Rep.No. 1884, 89th Cong., 2d Sess., 35 (1966).

440 U.S. at 738, 99 S. Ct. at 1463-1464; *See Pine Builders, Inc. v. United States*, 413 F. Supp. 77, 80 (E.D. Va. 1976) ("The purpose of the Act, we believe, was to fit tax liens into the priority scheme of the UCC.").

According to the Court in *Kimbell Foods*, Congress sought to improve the status of secured creditors by enacting the FTLA, and nothing in the FTLA indicates a federal interest in granting the government priority over commercial lenders where the government has prepared its tax lien notices in a manner that renders them hidden from private secured creditors. The FTLA "provides further evidence that treating the United States like any other lender would not undermine federal interests." 440 U.S. at 738, 99 S. Ct. at 1463. As explained by a leading commentator, Barkley Clark, *Spearing Tool* deviates from the intent of the FTLA by adopting a federal standard at odds with the standard governing debtor names in financing statements filed under the U.C.C.:

> One of the primary purposes of the 1966 Federal Tax Lien Act is to dovetail with Article 9 of the UCC. The statute and the regulations implementing it give the IRS plenty of flexibility to adopt internal operating procedures that run parallel to Article 9 so that all searches . . . can operate according to the same rules . . . Though federal law clearly trumps state law, the UCC rules governing debtor names should be considered the proper standard for federal tax lien filing.

1 Barkley Clark et al., *The Law of Secured Transactions Under the Uniform Commercial Code*, ¶ 5.02[6][a] at 5-14 (rev. ed. 2005).

Thus, the decision below goes too far. The Sixth Circuit, by invoking the Supremacy Clause, disregards uniform State law, well-developed commercial practice, and the characteristics of modern search and filing technology, despite the fact that neither the FTLA nor the regulations promulgated thereunder preclude the adoption of State debtor identification standards as the governing standard under the FTLA. The Sixth Circuit decision awards the federal government an unfair advantage over all private parties, including secured lenders. *Spearing Tool* allows the government to achieve priority based on a tax lien filing that cannot be discovered by a private party who requests an official search under the debtor's exact registered name. This result is squarely at odds with the underlying purpose of the FTLA.

II. Modern Search and Filing Systems Necessitate an Exact Name Standard for Federal Tax Lien Filings

In addition to unfairly favoring the government with a lesser standard of precision in identifying the taxpayer than applies to secured parties filing under Article 9 of the U.C.C., the Sixth Circuit decision adopts a rule anchored on characteristics of an antiquated filing system that no longer exists. The days are long past when a paper page in a county index could contain a federal lien filed under an erroneous or approximate name that is found, by visual inspection by a human searcher, because it appears "directly above a correctly filed lien under the taxpayer's correct name . . . ." *Crestmark Bank v. United States (In re Spearing Tool & Mfg. Co., Inc.)*, 302 B.R. 351, 356 (E.D. Mich. 2003), *rev'd*, 412 F.3d 653 (6th Cir. 2005).

The States, in a marked departure from paper-based records, have created and currently operate, for both U.C.C. filings and federal tax lien filings, computerized filing and search systems that employ rigid, but well-defined, search logic. This change has profound implications for establishing a workable standard to identify parties in filings that can be electronically searched. The drafters of Revised Article 9 recognized this and crafted the exact name standard for registered organizations, such as corporations, with this searchability requirement in mind. *See Pankratz Implement Co. v. Citizens Natl. Bank*, 130 P.3d 57, 2006 Kan. LEXIS 141 (Kan. March 17, 2006) (where filing office's search logic did not reveal creditor's filing that contained misspelling of borrower's name, filing was seriously misleading as a matter of law, relying upon *Clark v. Deere & Co. (In re Kinderknecht)*, 308 B.R. 71 (B.A.P. 10th Cir. 2004)); *Host America Corp. v. Coastline Financial, Inc.*, 2006 U.S. Dist. LEXIS 35727 (D. Utah May 30, 2006) (use of standard search logic failed to reveal filing and therefore filing was seriously misleading).

As correctly noted by the District Court in this case, and fully consistent with the framework for filings and searches created under Revised Article 9 of the U.C.C., the "Secretary of State will not search variants of the name (as it did under [former Article 9]), and the public has no independent access to search the index." *Spearing Tool*, 302 B.R. at 356 (footnote omitted). *See In re FV Steel & Wire Co.*, 310 B.R. 390, 394 (Bankr. E.D. Wis. 2004) ("'the secured party is dependent on the kind of computer search logic used by a particular state's filing office. *The simple solution is to get the debtor's name right.*'" (citation omitted; emphasis in original)); *Miller v. Van Dorn Demag Corp. (In re Asheboro Precision Plastics, Inc.)*, 2005 Bankr. LEXIS 1091 at *22-23 (Bankr. M.D.N.C. March 1, 2005) ("'Under the new standard, a name error is fatal if a search under the correct name, using the filing office's standard search logic, would not disclose the financing statement.'") (citation omitted).

Under the current search regime, computerized searches conducted by the State filing offices are the only means by which a prospective creditor may obtain a federal tax lien and U.C.C. financing statement search report upon which it may legally rely. In this environment, certainty and equality of treatment require all creditors to file and search using a corporate debtor's registered legal name. It is "not reasonable for searchers to conduct one search for liens that might include federal tax liens, and require them to conduct separate, multiple searches under the debtor's multiple possible names for a possible federal tax lien." (302 B.R. at 356-57).

Given the realities of the filing and search system as it *now* exists, the requirement to "identify the taxpayer" must be interpreted in a manner that comports with the most basic

requirement for a notice filing — that the filing be capable of being found with a proper search. To conform to this standard, the government would be required to do no more than that which every private party must do under Article 9 of the U.C.C. to assure itself of priority, *i.e.*, file its liens under the corporation's easily ascertainable registered name.

III. *Spearing Tool* Impairs the Availability of Credit and Increases the Costs of Borrowing

The Sixth Circuit decision unfairly and needlessly imposes added costs and risks on lenders and other parties who depend upon the integrity of a workable computerized lien filing and search system. *Spearing Tool* compels lenders to conduct multiple searches of possible name variations, abbreviations, and misspellings every time credit is advanced (or every 45 days in the case of revolving lines of credit where advances are made daily), in an attempt to uncover a tax lien. Lenders must request myriad searches when the transaction involves borrowers whose names include words that are commonly abbreviated in more than one way. For example, countless borrowers have the word "Federal," "Associated" or "General" in their names, and there are several common abbreviations of these words. The quandary that *Spearing Tool* creates, therefore, is how a lender can determine with certainty which variations exist and are common enough to require a search. "*Thanks to the Sixth Circuit decision, secured lenders have a new headache. Unfortunately, finding competing tax liens can be a little like looking for a needle in a haystack.*" Barkley Clark et al., *Clark's Secured Transactions Monthly* (July 2005) (emphasis added).

Even worse, despite undertaking a burdensome and costly effort to protect itself by ordering numerous searches under name variations, a lender still remains in jeopardy of its liens being subordinated if it fails to guess which incorrect version of the borrower's name actually appears on the government's tax lien notice:

> After *Spearing Tool*, Article 9 filing systems searchers can find all effective filings only by searching in at least some incorrect names — with no way to know for sure *which* incorrect names. The effect is to leave filers and searchers trapped in a twentieth-century filing system, continuing to waste resources on a problem technology has already solved, because a single court rejected that technology at the critical moment.

Lynn M. LoPucki, "The Spearing Tool Filing System Disaster" (2006) at 34, UCLA School of Law, Law-Econ Research Paper No. 06-10; available at SSRN: *http://ssrn.com/abstract=890312.*

Indeed, the criticism of *Spearing Tool* leveled by Clark and Professor LoPucki accurately reflects the broader criticism that has been directed at the Sixth Circuit decision. Multiple journals and publications have been unsparing in their disappointment with *Spearing Tool*, *e.g.*, Meghan M. Sercombe, Note, *Good Technology and Bad Law: How Computerization Threatens Notice Filing Under Revised Article 9*, 84 Tex. L. Rev. 1065, 1089 (March 2006) ("The end result is a disastrous conflict between state and federal law . . ."); Edmund S. Whitson III, *"Spearing" the Secured Creditor, Sixth Circuit Applies "Bluebook" Rule to IRS Lien Notice Requirements*, 24 Am. Bankr. Inst. J. 24, 65 (September 2005) (From a "policy perspective"

Spearing Tool is "troubling for at least two reasons."); Sandra Schnitzer Stern, *Structuring and Drafting Commercial Loan Agreements*, ¶ 22.04 at 22-5 (rev. ed. 2006) ("From the standpoint of secured creditors, this case is wrongly decided, but not merely because it favors the IRS over secured creditors."); Stephen D. Sayre & Darrell Pierce, *Secured Lenders Beware: IRS Plays By Its Own Rules In Filing Federal Tax Liens*, 61 Secured Lender at 28, 32 (September 1, 2005) ("This decision is problematic for secured lenders and at odds with the policies behind Revised Article 9.").

Adding to the woes and costs of lenders is the fact that under typical contracts for asset-based financing, the costs to the lender of performing multiple lien searches are borne by the borrower. Already, lenders continuously check for federal tax liens because of the "forty-five (45) day rule" contained in 26 U.S.C. § 6323(c) and (d); not surprisingly, these costs are typically passed on to the borrower. Thus, *Spearing Tool* only increases transaction costs to borrowers while making it more difficult for commercial lenders to determine reliably the existence of prior liens.

When lenders cannot mitigate their credit risks with reasonable commercial behavior, the cost of credit to borrowers rises. In cases where the creditworthiness of the borrower is marginal, a secured lender may elect not to lend at all or to greatly reduce the credit made available because of the additional risks of undiscovered government tax liens. This availability of credit could be the difference between the survival of a company and the filing of a petition in bankruptcy. As a result, the decision below will likely lead to more bankruptcy filings, as lenders balk at extending further credit to distressed companies that might otherwise

have received workout financing but for the lender's heightened concerns about the possible existence of undiscoverable federal tax liens.

Unfortunately, lenders have been left groping in the dark for direction because *Spearing Tool* offers no standard or guidance as to (a) how much latitude the federal government has in making erroneous filings, or (b) how extensively a secured lender must search to avoid a finding that an imprecise government filing primes its lien. The Sixth Circuit did not require the government to "identify the taxpayer" in any clear, predictable, or reliably searchable way – not even to use the name shown on the borrower's tax return. Because of this total absence of a standard, even if lenders scrupulously obtain copies of their borrowers' tax filings for search purposes, they cannot trust that the government will file liens accurately using that name.

CONCLUSION

In this era of computerized filing and search systems that are operated by the States and comprise the exclusive, official repositories of both federal tax lien notices and U.C.C. financing statements, it is imperative that the identity of the taxpayer in federal tax lien filings be defined by the same standard of precision that all other parties must follow. The appropriate standard must be one that ensures that the filing will be found, taking into account both the prevailing search technology and its limitations, and apply equally to federal tax lien notices and U.C.C. filings. Moreover, to remain consistent with the underlying purposes of the FTLA, as enunciated in *Kimbell Foods*, the standard for filing tax liens should be harmonized with the requirements of Article 9 of the U.C.C. Unless the government and private parties

are required to abide by the same standard of precision in specifying the debtor's name in their respective lien filings, an unfair advantage to the government results. Such advantage is contrary to the FTLA's overriding goal of modernizing the provisions applicable to federal tax liens within the framework for private parties' security interests under Article 9 of the U.C.C.

If secured lenders cannot rely with certainty on the lien searches they obtain from official sources, not only will they pass along the costs of the additional searches they are forced to make, but they will seek to cover the risk of secret federal tax liens by increasing the cost of the credit they extend to borrowers. Even worse, for those financially weaker businesses which need asset-based financing the most, lenders may decide to avoid the risk by extending less credit or refusing to extend credit. These results increase the cost of commerce without any countervailing justification, other than the government's wish to defend its haphazard practices under a standard that is no longer suited to the computerized filing and search systems presently in use. Additional litigation will certainly be spawned in future instances where government filings merely approximate a corporate taxpayer's name, and the government contends those filings are still "close enough," despite the fact that the government's filings could not be revealed in official searches of the correct name requested by lenders. The adverse effects of *Spearing Tool* will only become more pronounced if the uncertainties created by the decision are allowed to take hold.

For the above reasons, CFA respectfully submits that Crestmark's Petition should be granted.

RICHARD M. KOHN
BARBARA M. FLOM
GOLDBERG, KOHN, BELL, BLACK,
ROSENBLOOM & MORITZ, LTD.
55 East Monroe Street
Suite 3700
Chicago, IL 60603
(312) 201-4000

Respectfully submitted,

DANIEL WALLEN
Counsel of Record
JONATHAN N. HELFAT
LLOYD M. GREEN
OTTERBOURG, STEINDLER,
HOUSTON & ROSEN, P.C.
230 Park Avenue
New York, NY 10169
(212) 661-9100

Attorneys for Amicus Curiae